SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 638.

CHRISTOPHER STRASSHEIM, SHERIFF OF COOK COUNTY, ILLINOIS, APPELLANT,

vs.

MILTON DAILY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT.

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STATEMENT OF FACTS.

The Appellee, Milton Daily, was held by appellant under an executive warrant of the Governor of Illinois, bearing date May 21st, 1909, directing his delivery to the agent of the State of Michigan, application having been duly made by the Governor of the said State of Michigan under date May 19th, 1909, for the extradition of said Daily on a charge of bribery and also on a charge of obtaining money by false pretences.

While so held by appellant a writ of habeas corpus was issued on petition of said Appellee by the Honorable Kenesaw M. Landis, Judge of the District Court of the Northern District of Illinois, and upon hearing subsequently had thereon said Milton Daily was discharged from said arrest by the judgment of the court from which order of discharge the appellant takes this appeal.

For a full understanding of the questions involved so far as the same were disclosed at the hearing before the District Court, a recital may be given of the facts out of which arose the indictments which were the basis of the requisition of the Governor of Michigan, which was honored by the Governor of Illinois.

In the year 1907 the Legislature of the State of Michigan passed an act providing for the installation, equipment and operation of a twine and cordage plant in the State Prison located at Jackson, and by the terms of said act the Warden of said State Prison was authorized in connection with the Board of Control of the institution to purchase for and in behalf of the State the necessary machinery for such plant.

At the time of the passage of the act, Milton Daily, the appellee, was engaged in the business of selling sisal out of which such twine and cordage is made, and also the machinery necessary for its manufacture.

The machinery sold by him was that manufactured by the Hoover and Gamble Company of Miamisburg, Ohio, of which firm he was agent, residing at Chicago.

Bids were solicited by the Board of Control for the machinery necessary to install a 120 spindle twine system, and in response thereto sundry bids were submitted.

Prior to this time Daily had purchased on his own account machinery previously installed in a cordage plant at Ayton, in the Province of Ontario, Canada, which machinery had been used to some extent at that point. It was of the manufacture of the Hoover and Gamble Company and had constituted a plant of sixty spindle capacity.

Among the bids submitted to the Board of Control and the Warden under the authority of said act, was one from Daily offering this second hand machinery at a lower price than a bid made in the name of the Company for new machinery.

The Board after due consideration declined to purchase such second hand machinery, fearing that the purchase of it

might be used to depreciate with the trade the quality of the twine manufactured by the State and thus lessen the chances of sale.

The Warden was directed by the Board to obtain from Daily another bid for all new machinery, which said bid Daily, as the agent for the Hoover and Gamble Company furnished, offering to equip the plant for the sum of $29,105.00 with all new machinery. This bid was accepted by the Board of Control and a contract duly made in accordance therewith with the Hoover and Gamble Company.

Prior to the tender of said last mentioned bid, Daily had entered into a conspiracy with Allen N. Armstrong, the Warden of the Michigan State Prison, and with the Hoover and Gamble Company in whose name the said contract was taken, that in place of the new machinery called for by the bid and the contract, the second hand machinery, before spoken of should be removed from Ayton, Canada, to the shops of the Hoover and Gamble Company in Ohio, there repainted and furnished with certain new parts, and should then be reshipped to the Michigan State Prison as the machinery provided for by the contract in question. The testimony of Mr. Armstrong, the ex warden, is found in the record (Rec. 209, Abs. 86) and established the fact that pending the furnishing of the bid by Daily last above set forth, Armstrong had been approached by Daily in the City of Chicago, to permit said second hand machinery to be installed in pretended compliance with the contract, and not to expose the deception, in return for which he was to receive from Daily a present of a thousand dollars or more.

The machinery was installed, including the second hand machinery which had been removed from Ayton, repainted and finished in the shops at Miamisburg and after shipment was completed, settlement and payment was made therefor, and later Armstrong, then warden of said prison, received through the hands of the son of Daily a present of $1,500.00 in money.

On May 1st, 1909, a grand jury, sitting in said county of Jackson, indicted Milton Daily for the crime of bribery of Armstrong, and also indicted Armstrong, Daily and one Andrew J. Eminger, who was then the secretary of said Hoover and Gamble Company, upon the charge of obtaining from said State of Michigan by the false pretences before set forth, the purchase price of said machinery supposed to have been new, but in fact such old, worn and used machinery, to-wit the sum of ten thousand dollars.

These two indictments furnished the basis for the action of the Governor of Illinois, the propriety of which is in question in this cause.

The learned Judge of the District Court in discharging the appellee from arrest based his determination on different grounds as affecting the two indictments.

With respect to the charge of false pretences it was the opinion of the Court that the facts averred in the indictment upon consideration of the contract referred to therein did not constitute a crime.

With respect to the charge of bribery it was the opinion of the Court that no essential ingredient of the crime was shown to have been committed by the respondent while within the State of Michigan, and that, therefore, as to such offense he could not be said to be a fugitive from justice.

It is admitted that Mr. Daily was in the State of Michigan on three occasions while the plans to substitute for the new machinery provided for by the contract the second hand machinery owned by said Daily, were being carried into operation and made effective. On July 22nd, 1907, the Board of Control and the Warden met in Detroit for the purpose of considering the bids, and it was at that time that the bid was presented by Mr. Daily in person and accepted.

A few days prior to that Armstrong and Daily had met in Chicago, at which time Armstrong states that the arrangement was made that he should permit the second hand ma-

chinery to go through and receive a present, (Rec. 325, Ab. 142) and in the meantime, Mr. Daily, as he himself testifies, had communicated to the Hoover and Gamble Company the understanding that the Ayton machinery was to be considered as included in the bid, although he denies the conversation to which Armstrong testifies.

Mr. Daily was again in Michigan on November 14, 1907, (Rec. 318-319, Abs. 139). The purpose of this visit is not clearly established, but the testimony of Armstrong is to the effect that the purpose of Daily's visit at that time was to receive assurances that they would have no trouble from the consulting engineer, a question having been raised by Mr. Eminger with respect thereto, arising out of the word "new" in the contract.

Mr. Daily was again in Michigan after the machinery was in operation and when it was substantially accepted by the Board of Control.

We contend on behalf of the appellant that the presence of Daily in the State of Michigan upon each occasion was in furtherance of a corrupt purpose conceived and entered into by Daily, Armstrong and Eminger to impose upon the People of the State of Michigan, through the corruption and deception of its officers, property which it had not purchased in pretended compliance with a contract for different property, the increased price of which it was the corrupt purpose of the conspiracy to obtain.

Appellant does not rely upon the doctrine of constructive presence of Daily in the demanding state, but upon his personal presence when the offenses charged were committed.

Counsel for appellee relies almost entirely upon and introduced a volume of evidence to prove appellee's contention that he, Daily, was not personally present in Michigan on the 13th day of May, A. D., 1908, the date named in the indictments, and therefore urges that Daily was not a fugitive from justice.

Appellant does not contend that Daily was personally present in Michigan on the 13th day of May, A. D., 1908, but under the authority of the Hyatt case (188 U. S. 691) expressly waived the materiality of that date and offered undisputed evidence that Daily was present in Michigan on other dates upon which constituent acts of the crimes charged were committed. (Rec. 140, Abs. 58.) Daily himself testified that he was personally present in Michigan upon the dates which appellant relies upon. (Rec. 301-305, Abs. 131-133.)

ARGUMENT.

At the hearing before the District Court, from which the pending appeal was taken, we urged that the exercise of the jurisdiction of the Court was improvident because an appeal would lie from the decision previously rendered by the Hon. Willard McEuen, Judge of the Criminal Court of Cook County, to this Court, and that the exercise of jurisdiction by the District Court of the United States was in effect permitting an appeal from the State Court to the said District Court, but in view of the ruling of the Court upon the question, its assumption of jurisdiction, and the delay which has been thereby caused, and the importance to the State of Michigan of a speedy and final determination of the questions involved, we invoke the rule of

Appleyard v. Massachusetts, 203 U. S. 222,

and request the Court to proceed to final judgment upon this appeal.

We conceive the law to be well settled by the repeated decisions of the Court that the questions involved in this record are two.

First, the question of law, whether or not from the proceedings shown in the record it appears that the appellee, Milton

Daily, has been in fact, within the intent and meaning of the law, charged with a crime within the State of Michigan.

Second, whether or not the prima facie effect of the Governor's Warrant, the accompanying papers and the elements embodied in the charge have been overcome by proofs adduced on behalf of the petitioner in the habeas corpus proceeding tending to show that he was not within the meaning of the law a fugitive from the justice of the State of Michigan.

FIRST, WAS THE DEFENDANT CHARGED WITH CRIME IN THE DEMANDING STATE?

Upon this proposition we contend that the case at bar is governed by

Pierce v. Creecy, 210 U. S. 387.

In that case the indictment was examined for the purpose of determining whether or not it constituted such a charge of crime as would make it the basis for the warrant of the Governor ordering the extradition of the defendant named in it. It was there said upon the authority of many cases cited, page 402, that:

> "The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled."

After further discussion the Court applies to the charge pending in that case the language of the statute creating the offense, and conceding for the purpose of argument the correctness of all the assertions of the defendant affecting the character of the pleading, but finding in it substantial aver-

ment of the elements prescribed by the statute, held the indictment good so far as the requirements of the extradition procedings were concerned.

We can confidently submit the indictments in the case at bar to the same test. Not only is the language of the statute met by the direct averments of the indictments, but from the facts recited the statutory components of the offense are clearly established.

The provisions of the Michigan statute governing indictments specifically provide that after verdict for a statutory offense the indictment shall be held sufficient if it describes the offense in the words of the statute.

Compiled Laws of the State of Michigan, Sec. 11924.

In addition thereto various sections are found providing against the vitiation of indictments by informalities and for their amendment in proper cases.

Compiled Laws Sec. 11918, et seq.

The provisions of the statutes of Michigan defining the crimes involved in this case, namely, bribery and the obtaining of money or other property by false pretenses are as follows:

> "Every person who shall corruptly give, offer or promise, to any executive, legislative or judicial officer, after his election or appointment, and either before or after he shall have been qualified, or shall have taken his seat, any gift or gratuity whatever, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding which may be then pending, or may by law come or be brought before him in his official capacity, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding three thousand

dollars, and imprisonment in the County jail not more than one year."

Compiled Laws, Section 11311.

"Every person who, with intent to defraud or cheat another, shall designedly by color of any false token or writing, or by any other false pretense, * * * * obtain from any person any money, personal property or valuable thing. * * * * if such money, personal property or valuable thing shall be of the value of twenty-five dollars or less, shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding three months; and if * * * * such money, personal property, valuable thing * * * * shall be of the value of more than twenty-five dollars, such person shall be punished by imprisonment in the state prison not more than ten years or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year."

Compiled Laws, Section 11575.

The learned District Judge determined that the facts set up in the indictment for false pretenses nullified the averments of the existence of an offence considering the terms of the contract, and warranted his finding, that no reliance was placed upon the false pretenses, but that the warranty of the vendor as to the condition of the property sold and the provision for inspection and approval by the consulting engineer of the State, were the moving causes for the reliance of the State. (Rec. 331, 332, Ab. 144, 145.) This is not, we contend, with due deference to the learned Judge, a proper question for determination in this proceeding, and even if it were the finding of the Court below is not in accord with the authorities upon the question of law involved.

We believe it will not be contended that the Court upon application for habeas corpus has any power whatever to apply the facts to the charge with a view to determining the guilt or innocence of the defendant charged. The citation of authorities upon this proposition is unnecessary. Whether or not the fact that the contract contains a warranty has any bearing whatever upon the merits of the charge must be for the Courts of the demanding state to determine. Whether the existence of such a warranty be recited in the indictment or not it is merely evidentiary and might be supplemented, withheld or controverted by the actual evidence adduced at the trial.

The indictment contains several counts in one or more of which the nature of the pretenses used is not averred, nor is such allegation necessary under the laws of the State of Michigan.

People v. Winslow, 39 Mich. 505,
People v. Dyer, 79 Mich. 480.
People v. Butler, 111 Mich. 483.

And upon the trial the counts containing the statements made the basis for the opinion of the learned court below might be entirely abandoned. At all events their color and effect are not for consideration upon the hearing of a habeas corpus petition upon extradition. But the presence of a warranty in a contract would not, as a matter of law, prevent the maker thereof from being guilty of criminal false pretenses relative to the character or attributes of the thing sold.

Jackson v. People, 18 N. E. Rep. 286, (Ill.)

was precisely such a case. There a horse was sold upon representations of quality. It was sought to avoid the criminal character of the representations because of the insertion of the warranty in the contract. The Court says with respect to the claim, commencing on page 288:

"If the rules contended for are to be applied in such case, every person selling property and obtaining money therefor by false pretenses can escape the penalty provided by law, by simply inducing the purchaser to accept a bill of sale in which some warranty may be inserted, and thus, by a show of fairness, be enabled the more effectually to perpetrate the fraud. The instrument prepared for execution beforehand, as was here done, might contain, in the form of warranty, the very representations relied upon by the purchaser, and if the acceptance of such instrument would absolve the defendant from criminal responsibility for pretenses before then made, he would be enabled, by changing the form, but not the substance, of his representations to more effectually carry out his fraudulent purposes. Careful as the law is of the rights of persons, we cannot lend our sanction to the application of the rules where it would be attended with such consequences."

People v. Winslow, 39 Mich. 505.

This was a prosecution for conspiracy to obtain moneys by false pretenses. The pretenses charged were a false showing of business, a false pretense of being about to engage in other business and other fraudulent devices to give color to assurances that a situation could and would be procured for the complainant and because of the fact that the money was obtained through a contract, it was sought to avoid the consequences of the criminal conspiracy. The Court said, page 507:

"Nor can the conspirators escape responsibility for the fraud because they accomplished it by means of a promise. The promise was accompanied by assurances of Winslow's confidence in his ability to procure the

> desired situation, which evidently referred to a situation in Parker's proposed business and which the jury must have found were wholly baseless. The promise was therefore accompanied by a false assertion of confidence, as well as by various false and fictitious devices calculated to win confidence in it."

We submit that the language used by the Supreme Court of Michigan in this case applies concretely to the facts in the case at bar. The contract having been averred it is further charged that "Before the making of said contract said Allen N. Armstrong, conspiring with Milton Daily and A. J. Eminger, had corruptly agreed to substitute for the machinery so contracted to be sold to said State of Michigan for said plant as aforesaid certain old, worn and second hand machinery of less value than the machinery so contracted to be sold, the said Board of Control of the State Prison at Jackson being ignorant of such conspiracy and such intended substitution of worn, second hand and used machinery for the new machinery required by said contract to be furnished, and being deceived and defrauded by the said substitution, and the said machinery so contracted for not being furnished as provided by said contract, but in place and stead of a portion thereof said used, second hand and worn machinery having been theretofore delivered and installed."

Testimony is found in the record from Mr. Daily, himself, that this machinery was shipped to Miamisburg, Ohio, the purpose of the Hoover and Gamble Company being to have every machine that went to Jackson just the same; that the Ayton machinery was sent to Miamisburg, Ohio, for the purpose of being repainted, and every new improvement that was put on the machines was put on there at Miamisburg, Ohio, that no man could recognize the machines that came from Ayton, practically every machine being the same. He further says, "I did not recognize the machines as the machines that came from Ayton." (Rec. 309, Tr. 135.)

In view of this testimony the language of the Court below at the foot of page 144 of the Transcript of Record; "Here is all of this machinery. You and your experts are here now on the ground. Look it over. It is all new. On the theory that if it was old and worn the victim and his expert mechanics would discover it the first time, and in a criminal prosecution that phase would exclude the idea of a crime," is apparently impertinent to the real issue even if the Court had power upon this inquiry to pass judgment upon a fact open to controversy, namely, the character and effectiveness of the pretenses used.

We respectfully submit that this disposal by the Court below of the indictment charging false pretenses was error, and that this indictment as well as the one charging bribery should be held sufficient to satisfy the first requirement of our case, that the defendant Daily was in fact charged with crime.

SECOND, HAS THE DEFENDANT PRODUCED EVIDENCE CONTROVERTING THE CHARGE THAT HE IS A FUGITIVE FROM JUSTICE?

It is contended on behalf of the appellee that he was not within the State of Michigan at a time when it was possible for him to have committed the offence charged, and that he is not, therefore, within the meaning of the law a fugitive from justice.

We contend with reference to both the charges specified in the warrant of Gov. Deneen that the defendant was within the boundaries of the State of Michigan in furtherance of a criminal conspiracy entered into between said defendant and other persons to violate the laws of the State of Michigan by corruptly inducing the Warden of the Michigan State Prison to accept a bribe to influence his official action in a matter legally pending before him for decision and through such

bribe induce him to permit the fraudulent substitution of certain second hand and worn machinery in the place of new machinery in satisfaction of the requirements of a contract in the making and acceptance of which said machinery the said Warden had official authority.

It was clearly contemplated by this conspiracy that a bid should be made by Mr. Daily purporting to be for new machinery, the acceptance of which would result in a contract calling for the supplying of such new machinery, but that in fact the conspiracy involved the substitution of old machinery to the knowledge of the parties to the conspiracy, but with such renewals and changes as would prevent those in ignorance of the plot from observing the substitution.

The defendant Daily tendered the bid in person within the State of Michigan, thus setting in motion the machinery by which the result was ultimately to be accomplished. He again visits Michigan in November, 1907, while the machinery is actually being furnished and the fraudulent substitution being effected through the consent of the Warden induced by the bribe, and the ignorance of innocent agents of the State of Michigan, induced by fraudulent devices by which the character of the substituted machinery was hidden from observation. He again visits Michigan at about the time of the acceptance of the machinery by the officials of the State of Michigan and the allowance of his bill therefor.

We submit that under the authorities applicable to these conditions Daily has not shown his absence from the State at the times when elements of the offense were in progress, and his active participation within the State in all the necessary steps in the consummation of the conspiracy should be held to be affirmatively established by the uncontroverted testimony in the record.

It is for the Courts of Michigan to hold, in the first instance at least, what are the essential elements of the crime of bribery under its statutes. We respectfully submit that it is

not the duty of the Federal Tribunal to prescribe in advance certain elements deemed essential to the completion of the crime, and because of the absence of proof, upon hearing on habeas corpus, of the commission by the appellee of those elements or ingredients, as the learned District Judge calls them, to prevent the Courts of the demanding State from passing their judgment as to what shall be deemed an infraction of the laws of the demanding State in this particular.

The only case which we have been able to find dealing directly with the question which has been before the Court of last resort is

Ex Parte Huffstot, 180 Fed. 240.

We are advised that an appeal taken from the determination of the Court below in this case has been dismissed in this Court.

The facts in that case are not nearly so incriminating in their tendency as those actually admitted by the Record in the case at bar. There, as here, a conspiracy to bribe public officers was the basis of the charge. The Court held that the offence might have been committed without the personal presence of the defendant within the demanding State, but that in such a case, even though indicted, he could not be extradicted. The acts averred in the indictment did not tend to fix the presence of the defendant within the demanding State, and evidence taken before the Governor of New York upon the application for extradition was very vague upon the subject. There was testimony, however, on the part of the Assistant District Attorney of Pennsylvania County, in which the indictment was found, that there was circumstantial evidence before the grand jury as to acts by the defendant during the period over which the conspiracy extended. The Court in its opinion says, page 243:

> "This evidence is undoubtedly vague; but I think that the substantial effect of it is that, while there was no specific evidence by an eye witness that Huffstot was in Pennsylvania on any particular day on which any act in furtherance of this conspiracy was done, there was circumstantial evidence from which a jury would be justified in drawing the inference that he was there on such a day. Now, if it shall be proved that a conspiracy was entered into by Mr. Hoffstot, and circumstantial evidence shall be offered sufficient to authorize a jury to draw the influence that he was present in Pennsylvania when any act material in carrying out the objects of the conspiracy was done, I think that he would be properly held to have been within the State of Pennsylvania at the time that the crime charged in the indictment was committed, and that his subsequent return from that State to New York would render him a fugitive from justice within the meaning of the United States Constitution and statute upon that subject."

The Court further discussing the averments of the indictment relative to the receipt of money from certain banks on page 244 remarks:

> "It may well have happened that Huffstot, at some of his visits to the City of Pittsburg, engaged in the conspiracy to pay this money, or did some act in connection with its collection and payment."

This comment of the Court is clearly applicable to the present case. We are not confined to the testimony adduced as to the acts performed by the appellee while within the State of Michigan, but if the time of his visits were such that the conspiracy was then being carried out by acts with which he might possibly have been connected, the obtaining and

presentation of proofs at his trial showing the incriminating character of his participation would be a possibility which it seems to us is clearly within the qualifying language of,

Hyatt v. Corkran, 188 U. S. 691.

We quote from the opinion of the Court commencing on page 710, as follows:

> "In the case before us the New York Court of Appeals held that if upon the return to the writ of habeas corpus it is clearly shown that the relator is not a fugitive from justice, and there is no evidence from which a contrary view can be entertained, the court will discharge the person from imprisonment, but that mere evidence of an alibi, or evidence that the person demanded was not in the State as alleged, would not justify his discharge, where there was some evidence on the other side, as habeas corpus was not the proper proceeding to try the question of the guilt or innocence of the accused. And the court also held that the conceded facts showed the absence of the accused at the time when the crimes, if ever, were committed, and that the demand was in truth based upon the doctrine that a constructive presence of the accused in the demanding State at the time of the alleged commission of the crime was sufficient to authorize the demand for his surrender.
>
> We are of opinion that the warrant of the governor is but prima facie sufficient to hold the accused, and that it is open to him to show by admissions, such as are herein produced, or by other conclusive evidence that the charge upon which extradition is demanded assumes the absence of the accused person from the State at the time the crime was, if ever, committed."

We respectfully submit that it is unnecessary at the hearing on habeas corpus to establish the purpose of the defendant, or the nature of his activity, if at any opportune time he was within the demanding State. If his presence within the State is under such circumstances that proof might be offered at the trial as to the criminal character of his acts and the purpose of his visits it is not incumbent to make such proof at the hearing on habeas corpus.

But in the case at bar there is no reason offered for the presence of the defendant Daily within the State of Michigan which does not associate him with the working out of the conspiracy from which the offense as charged resulted.

We cite as additional authorities on the question of fact the following:

In re Cook, 49 Fed. 833.

This case involved a charge of receiving deposits in an insolvent Bank. The accused insisted that because he had conclusively proven that he was not within the State at the time that the deposit was received that he could not be extradited, not being a fugitive from justice. In discussing this contention the following language of Judge Jenkins on page 842 is pertinent to the case at bar:

> "In construing the act, regard must be had to the mischief sought to be prevented. The purpose of the law is manifest. The act was designed to prevent fraudulent banking, and to protect the public from dealing with such unsafe or insolvent concerns. The manual receipt of the deposit is but one step, and the final step, in the consummation of the offense. There must precede the unsafe and insolvent condition the representation of safety and solvency, and the knowledge of the unsafe and insolvent condition. These are the essentials of the offense. The receipt of the de-

posit may be by an innocent instrument of a guilty officer of the bank. It is a criminal act to hold out an insolvent bank as safe or solvent, effective to the consummation of crime upon the receipt of the deposit."

Later the Court on page 843 says:

"When the criminal act charged is one as to which it is essential that several acts or facts should concur, and which may occur at different times, if the party charged commits within the State any one of the acts constituting the crime, but departs the State before the happening of other acts contemplated and authorized by him, or upon the happening of events necessarily resulting from his act, can he be deemed a fugitive from justice? We are of opinion that he must be so regarded. The purpose of the constitutional provision was that criminals should find no asylum within any State of the Union; that 'the law might everywhere and in all cases be vindicated.' It will not do to refine too curiously upon such enactments, so that the very design of the law shall prove abortive, so that that shall become a shield and a protection which was designed as a weapon of offense. Can it be that one may not be regarded a fugitive from justice who within a state hires another to kill and murder, but before the killing departs the jurisdiction to avoid the consequences of the murder he has designed? Can it be that, if one within a state makes false representations to procure the goods of another, and departs the state before that other actually parts with his property on the faith of these representations, he may not be deemed a fugitive from justice?"

Re William Sultan, 115 N. C. 57.

This case involved the correctness of an order of the Su-

perior Court releasing from custody in a habeas corpus proceeding one for whom the Governor had issued a warrant for the purpose of returning him to the Governor of Pennsylvania as a fugitive from justice. He was charged with having obtained goods by false and fraudulent pretenses. The date in the indictment was given as the 17th day of September, 1892, which was the date of the alleged false representations. The goods were in fact delivered to a common carrier on October 6th, consigned to the petitioner at Newburn in the state of North Carolina. After a discussion of the law and the citation of authorities including quotations from the case previously cited by us the Court held him to be a fugitive from justice even though the crime had not been completed within the state of Pennsylvania.

Hayes v. Palmer, 21 App. Cases, D. C., 450.

We quote from the opinion of the court in this case commencing on page 460, as follows:

> "It remains to apply the doctrine enounced to the special facts of the case at bar. There is neither concession nor proof that the demand for the arrest and removal of the appellant to the State of Maryland, as a fugitive from justice there, was founded on his constructive presence, merely, at the time of the commission of the crime charged."

Also commencing on page 461, as follows:

> "We think it was his duty to meet the *prima facie* case of the State by proof showing with precision of statement the date of his departure from Maryland. Had he done so, it would have devolved upon the State to show that he was a fugitive from justice by producing evidence that he was in the State at the time charged in the indictment, or to prove that said date

had been erroneously charged and could be carried back to the necessary time. Until the discharge of the burden imposed upon him by the *prima facie* case of the State, through the presentation of a distinctly traversable issue, the latter ought not to be called upon to reply."

Again on page 462, as follows:

"For example, suppose the case of a party indicted for a secret murder that had been brought to light, long after its commission, by the discovery of the partly decomposed body, or the skeleton of the murdered person; the evidence being entirely circumstantial, and the date of the commission of the crime a matter of conjecture on the part of the grand jury. The accused, having been arrested in another State as a fugitive from justice, testifies that he was not in the demanding State on the day alleged, but had been there shortly before, and frequently during the same summer, failing, however, to fix the latter dates at all. Would this evidence be sufficient to impose upon the demanding State the burden of introducing witnesses to prove the various circumstances from which it might reasonably be inferred that the murder had occurred shortly before the date alleged in the indictment? We think not."

In re Palmer, 138 Mich. 36.

This case in the Courts of the demanding State recognizes the rule we contend for, the Court on page 37 saying:

"Clearly, we may not, in the exercise of this restricted power, enter upon a trial of the alleged offender. This would put upon the demanding State

> a burden of two trials—the one at a place removed from the place where the alleged offense was committed."

With respect to the presence of the petitioner in the demanding State, the principle which we contend for here is abundantly recognized by the Court in the following language on page 38:

> "The affidavits disclose that the petitioner was present at Cleveland at a date shortly before that laid in the indictment, but not at that date or since. From this it is argued that he could not have fled from Ohio after committing the offense. The time laid in the indictment is not ordinarily so vital as to exclude proof of the offense at an earlier date."

Many cases might be cited from this Court showing its disinclination to interfere with the proceedings of the Executives in matters of this kind, but it would seem to be entirely unnecessary to call the attention of the Court to its repeated utterances along these lines. We content ourselves with referring the Court to one of the latest decisions touching this matter.

Compton v. Ala. 214 U. S. 1.

There the Court on page 8 says:

> "When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective States concerned as a sufficient basis, in law, for their acting—the one in making a requisition, the other in issuing a warrant for the arrest of the alleged fugitive—the judiciary should not interfere, on habeas corpus, and discharge the accused, upon technical grounds, and unless it be clear that what was done was in plain contravention of the law."

We submit that in the case at bar the record clearly shows that Milton Daily was duly charged with crimes by indictments of a grand jury within the State of Michigan, and that he was found within the State of Illinois after the commission of such crimes, having been present within the demanding state at times when it was not only possible but certain that steps in furtherance of a criminal conspiracy were taken, and that such criminal conspiracy involved consequences affecting in the most important degree the sovereignty of the State of Michigan, and that only abstruse technicalities are being or can be asserted against the validity of the proceedings for his extradition and return to the State of Michigan for trial.

Under these circumstances we respectfully urge that the order of the Court below should be reversed and the appellee remanded to the custody of the agent of the State of Michigan in accordance with the warrant of the Governor of the State of Illinois.

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Attorney for Appellant,
Lansing, Michigan.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1910.

No. 638.

CHRISTOPHER STRASSHEIM, Sheriff of Cook County, Illinois,
Appellant,

vs.

MILTON DAILY,
Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF FOR MILTON DAILY, APPELLEE.

WILLIAM S. FORREST,
Counsel for Appellee.

Geo. Hornstein Co., Printer, Chicago.

INDEX.

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STATEMENT OF THE CASE.

There is set forth in this brief for the appellee a statement of the case, because the statement of facts presented in the brief for appellant is, it is submitted, incomplete and, in some respects, inaccurate, especially as to matters in evidence, which counsel for appellant contend are controlling and decisive of all the issues raised on the record.

1. *The proceedings in the District Court prior to the filing therein of the amended answer of Milton Daily to the return of Christopher Strassheim Sheriff, etc., to the writ of habeas corpus.*

On June 23, 1909, Milton Daily, the appellee, filed in the United States District Court for the Northern District of Illinois, Eastern Division, his petition for the writ of *habeas corpus*, in which he complained and showed, what was thereinafter more fully and particularly set forth in the amended answer. An abstract of the amended answer is hereinafter stated.

The petition concluded with a prayer in the usual form for the issuance of the writ of *habeas corpus*, to be directed to said Christopher Strassheim, sheriff, etc., and was supported by the affidavit of Milton Daily.

In compliance with the prayer of the petition the writ of *habeas corpus* issued out of the District Court on June 23, 1909,—the same day on which the petition was filed.

On the afternoon of the same day Christopher Strassheim, sheriff, etc., appellant, to whom the writ was addressed, filed his return thereto in the District Court. The return was, in substance, that he, Christopher Strassheim, Sheriff of Cook County, Illinois, produced before the court the body of Milton Daily in obedience to the writ of *habeas corpus* and that Milton Daily was held in his custody, as such sheriff, under and by virtue of a certain Governor's warrant, which was issued May 21, 1909, by the Hon. Charles S. Deneen, Governor of the

State of Illinois, directing him as such sheriff to secure Milton Daily and deliver him into the custody of Jacob F. Strobel, the agent of the executive authority of the State of Michigan, as by reference to said Governor's warrant, a copy of which was thereto annexed, will more fully and completely appear.

There is a clerical error in the extradition warrant in this: It is recited therein that the executive authority of the State of Michigan has produced before the Governor of the State of Illinois "a *copy* of an indictment," etc. The fact is that the Governor of Michigan produced before the Governor of Illinois a copy of an indictment for bribery and also a copy of an indictment for obtaining money by false pretences. See the requisition. (Trans. Rec., 31.)

After the return of the sheriff was filed in the District Court, Daily was admitted to bail pending the disposition of the proceedings in that court.

On June 24, 1909, it was agreed and stipulated by and between the parties that the petition for the writ of *habeas corpus* "shall for all purposes by both of said parties be taken as the answer of the said Milton Daily to the return in the above entitled case of said Christopher Strassheim, sheriff," etc. (Trans. Rec. 26.)

On June 28, 1909, in the District Court, a demurrer by Strassheim was filed to the answer to the return. Thereupon followed argument by counsel for the respective parties upon the demurrer, which the court took time to consider.

On July 20, 1909, the demurrer was overruled. In the opinion overruling the demurrer, the District

Court held that the matters and things averred in the indictment for obtaining the $10,000 in money by false pretences, referred to in the extradition warrant and set forth *in haec verba* in the petition, did not constitute a crime against the laws of the State of Michigan, and that Milton Daily, the petitioner, did not stand charged by virtue of said indictment with the commission of any crime against the laws of the State of Michigan. (Trans. Rec. 149, 28.)

Upon the overruling of the demurrer counsel for Strassheim moved for leave to file certain affidavits. On October 8, 1909, the question of the admissibility of said affidavits was set down for hearing on October 14, 1909. No further mention is made in the transcript of the record concerning said affidavits.

On October 16, 1909, Daily filed in the District Court his amended answer to the return of Strassheim, sheriff, to the writ of *habeas corpus*. (Trans. Rec. 29-56.)

The relevancy of the matters and things, averred in the amended answer, will be at once apparent, if they are read in the light of the history of the transactions upon which are founded the indictments against Daily for bribery and for obtaining the $10,000 by false pretences. For this reason the history of those transactions is herein set out before the contents of the amended answer are stated.

2. *The transactions upon which are founded the accusations against Daily of bribery and obtaining $10,000 by false pretences, and the persons who participated in those transactions, as shown by the evidence, given at the habeas corpus hearing.*

From February, 1906, until February, 1909, Allen N. Armstrong, hereinafter called Armstrong, was warden of the Michigan State Prison in Jackson, Jackson County, Michigan, and Thomas J. Navin, Timothy C. Quinn and George W. Merriam constituted the Board of Control of that prison, and C. D. Wrentmore was consulting engineer to said Board of Control.

The Hoover & Gamble Company, of Miamisburg, Ohio, was engaged in the business of manufacturing machinery, including machinery for the making of twine and cordage. Andrew J. Eminger was secretary, and Milton Daily, the appellee, hereinafter called Daily, was its sales agent.

Daily's office was at 115 Dearborn street, and his residence at 1624 Kenmore avenue, in Chicago, Illinois. Daily was also the agent for Avelino Montes Sen C. Merida Mexico, dealers in sisal-hemp, which is used in the manufacture of twine and cordage.

Daily made Armstrong's acquaintance at Jackson, Michigan, not later than February, 1907, to which place Daily went to get information about the project to install a binder twine plant in Michigan State Prison.

On June 24, 1907, an act of the legislature of Michigan went into effect which, among other things, empowered, authorized and directed the warden (Arm-

strong) and the Board of Control of the Michigan State Prison at Jackson, Michigan, to purchase, erect, equip and maintain in that prison such buildings, boilers and equipment as were necessary for the manufacture of twine and cordage, together with a warehouse to be used in connection with the twine and cordage plant.

Pursuant to that act of the legislature the Board of Control called for bids for the equipment of a 120 spinner plant for the manufacture of twine and cordage at that prison, together with the necessary preparing machines. Bids were duly made by the Watson Manufacturing Company of Paterson, New Jersey, and also by the Hoover & Gamble Company, the latter making its bids in the name of its agent Daily, the appellee. Daily, as the sales agent for the Hoover & Gamble Company, made two bids. The first bid was to furnish all new machinery, to be manufactured by Hoover & Gamble Company, for $29,805, or part new and part used machinery, to be manufactured by the same company, for $28,015, and was made to the Board of Control by Daily in a letter written and mailed by him in Chicago, Illinois. (Trans. Rec., 131, 132.)

The "part used machinery" (called in the record the Ayton machinery), referred to in that bid, was machinery which had been manufactured by the Hoover & Gamble Company and had been set up at Ayton, Canada. Some of the "part used machinery" had been in use at Ayton, Canada, for a short time, not to exceed 45 days, and some of the "part used machinery" had not been used at all. It was all "manufactured by the Hoover & Gamble Com-

pany" (Trans. Rec., 140), and therefore was such machinery as was provided for in the contract. (Trans. Rec., 76, 77.) It was purchased by Daily in January, 1907. After the contract was signed the Ayton machinery was shipped from Ayton, Canada, to the works of Hoover & Gamble Company at Miamisburg, Ohio, where it was repainted. It could not be distinguished from machinery which had never been set up or used. The Ayton machines could be distinguished from the new machines installed in the prison plant at Jackson, Michigan, only by the numbers thereon (which fact is conclusive evidence that it was "free from any defects of materials" and was not "worn"). No part of the Ayton machinery was worn. (Trans. Rec., 134, 135.) The Board of Control declined to accept the first bid, which included the Ayton machinery, for a sentimental reason only, that is, "because they were afraid the International Harvester Company would use it against them; that the International Harvester Company would say that the State of Michigan had bought old machinery, and that the State of Michigan could not afford that." (Trans. Rec., 134.)

The Ayton machines, and in fact all the machines installed in the prison plant at Jackson, Michigan, by the Hoover & Gamble Company, were in actual use at the prison from some time in March, 1908, that is, about fourteen months before the return of either of the indictments, annexed to the requisition. The plant at Ayton was a 60-spinner plant. The plant at the prison in Jackson, Michigan, was a 120-spinner plant.

The first bid made by Daily was rejected, and

thereupon new bids were requested for *all new machinery*. The rejection of Daily's first bid and the request for new bids for all new machinery were made known by Armstrong to Daily at Daily's office in Chicago, Illinois, just before Daily made his second bid for all new machinery, which second bid was made in the form of a letter written, dated and mailed in Chicago, Illinois, July 19, 1907. (Trans. Rec., 131, 132, 134, 142.)

Before the rejection of Daily's first bid, the "part used machinery," that is, the Ayton machinery, was discussed by Daily, Armstrong, the several members of the Board of Control, the Governor of Michigan, and other persons, in several conversations, held in Michigan, Indiana and Illinois. (Trans. Rec., 131.)

The second bid was accepted on July 22, 1907, in Detroit, Michigan, by the Board of Control, all the members of the Board, the Governor of Michigan, Armstrong, Daily and Wrentmore, the consulting engineer of the Board of Control, being present. (Trans. Rec., 132.)

And thereupon a contract was drawn up and executed in August, 1907, as of July 22, 1907, and the second bid of Daily was, by reference thereto, made a part of the contract. The contract was signed in Michigan, by the members of the Board of Control, and at Miamisburg, Ohio, by the Hoover & Gamble Company, by its secretary and treasurer, Andrew J. Eminger. (Trans. Rec., 135.)

The Elsie Mills, whose name is appended to the contract as a witness, was, in July and August, 1907, an employe of the Hoover & Gamble Company at its office in Miamisburg, Ohio.

The contract and the second bid are set forth *verbatim* in the indictment against Daily for bribery. (Trans. Rec., 76.)

After Daily's second bid, as agent for the Hoover & Gamble Company, was accepted on July 22, 1907, at Detroit, Michigan, Daily immediately returned to Chicago and was not again in Michigan until November 14, 1907, on which day he went to Jackson, Michigan, at the request of Armstrong, and met Armstrong at the prison, for the purpose of determining what could be done to relieve the congested condition of the warehouse on the prison premises. Daily relieved that congested condition of the warehouse by temporarily stopping the further shipment of machinery to the prison by the Hoover & Gamble Company from Miamisburg, Ohio, and by ordering to be stored at Mobile, Alabama, a thousand bales of sisal-hemp, then in a ship on the Gulf of Mexico, and on the way to said prison. The building in which the machinery for the twine and cordage plant was to be installed by the Hoover & Gamble Company, it appears, had not been finished at this time, and pending the finishing of that building, Armstrong had been storing in the warehouse on the prison premises such machinery as had already been delivered by the Hoover & Gamble Company and about 3,000 bales of sisal hemp, all purchased by the Board of Control and received at the prison, to be converted into binder twine.

After November 14, 1907, Daily was not in Michigan until April 6, 1908, on which day he left Chicago in the morning and arrived in Jackson in the evening, and remained in Jackson until the after-

noon of April 7, 1908, at which time he returned to Chicago.

Daily's purpose in going to Jackson on April 6, 1908, was to meet Eminger there and with Eminger to look over the machinery and plant, which at that time had already been installed and was in actual operation. (Trans. Rec., 126, 136-137.)

On the evening of April 6, 1908, Daily met Eminger in Jackson and spent the evening there with him at a hotel. The next morning Daily went out to the prison, and at the prison met Armstrong, the Governor of Michigan, certain members of the Board of Control and Wrentmore, the Consulting Engineer of the Board of Control. Daily and Eminger remained in and about the prison plant until about eleven o'clock in the morning. The Governor, Wrentmore, Armstrong, Daily and Eminger. walked through the prison "by ones and twos" and examined the machinery. (Trans. Rec., 137.)

The machinery sold by the Hoover & Gamble Company to the Board of Control, commenced operations about March 17, 1908. Armstrong's affidavit, (Trans. Rec., 87.)

Subsequent to November 14, 1907, Daily and Armstrong did not meet until April 7, 1908. (Trans. Rec., 143.)

Daily has not at any time been anywhere in Michigan since April 7, 1908. (Trans. Rec., 126.)

3. *The amended answer of Daily to the return of Strassheim, Sheriff, to the writ of habeas corpus.* (Trans. Rec., 30.) *The proceedings subsequent to the filing of the amended answer.* (Trans. Rec., 57-66.)

The amended answer of Daily denies that the indictments, annexed to the requisition and referred to in the extradition warrant, charge Daily with having committed against the laws of Michigan either the crime of bribery or the crime of obtaining $10,000 by false pretences, or any other crime. It then avers that the extradition warrant was granted and issued solely and exclusively upon, because of and in pursuance of, the requisition of and from the Governor of the State of Michigan and certain papers which accompanied and were annexed to the requisition, and not because or on account of any fact, matter, thing or evidence, not stated in the requisition or in the papers, which accompanied and were annexed thereto, and that he, Daily, had read and knew the contents of the requisition and of all said papers. (Trans. Rec., 30-31.)

The amended answer next sets forth *verbatim* all of said papers. In the amended answer, as well as in the petition for the writ of *habeas corpus*, the indictment for bribery was marked "Indictment Exhibit A," and the indictment for obtaining the $10,000 by false pretences was marked "Indictment Exhibit B," and the two indictments are mentioned and referred to in the petition and amended answer as "Indictment Exhibit A" and "Indictment Exhibit B." (Trans. Rec., 31-52.)

In each of the four counts of the indictment for

bribery it is alleged that the bribe was *given* (and not that it was given, *offered and promised*) to Armstrong by Daily in the City of Jackson, in the County of Jackson, in the State of Michigan on the *13th day of May, 1908.* (Trans. Rec., 34-43.)

In each of the three counts for obtaining the $10,000 in money by false pretences it is alleged that the false pretences were made, and that the $10,000 were obtained, in the City of Jackson, in the County of Jackson, in the State of Michigan on the *1st day of May, 1908.* (Trans. Rec., 44-47.)

After setting forth all the papers annexed to the requisition the amended answer of Daily proceeds, as follows (Trans. Rec., 52):

> "And said Milton Daily in further answering said return states, that said requisition and said papers which accompanied and were annexed to said requisition do not contain any evidence whatever, competent or incompetent, which tends to prove that he, said Milton Daily, was corporeally within the State of Michigan at the time when it is averred in 'Indictment Exhibit A' that said alleged crime of bribery was committed, or at the time when it is stated in said affidavit of said Allen N. Armstrong that said Milton Daily (meaning the plaintiff in this *habeas corpus* proceeding) gave said Allen N. Armstrong the sum of fifteen hundred dollars, or at the time when, if ever, said alleged crime of bribery was committed, or at the time when it is averred in 'Indictment Exhibit B' that said alleged crime of obtaining ten thousand dollars in money by false pretences was committed, or at the time when it is averred in 'Indictment Exhibit B' that the alleged false pretences stated in 'Indictment Exhibit B' were made, or at the time when, if ever, said alleged crime of obtaining ten thousand dollars in money by false pre-

tences was committed, or at the time when, if ever, said alleged false pretences were made. (Trans. Rec., 53.)

"And said Milton Daily in further answering said return states that he, said Milton Daily, was not in the State of Michigan on the first day of May in the year 1908 or on any day on or about said first day of May in the year 1908, or on the thirteenth day of May in the year 1908 or on any day on or about said thirteenth day of May in the year 1908.

"And said Milton Daily further answering said return states that he, said Milton Daily, was in the State of Michigan on two or three different days in the year 1907 prior to the twenty-fourth day of June in the year 1907 (on which said twenty-fourth day of June in the year 1907 it is alleged in 'Indictment Exhibit A' and in 'Indictment Exhibit B' that a certain Act numbered 211 of the Public Acts of the State of Michigan took effect and became a law of the State of Michigan) and also on the twenty-second day of July in the year 1907 and on the fourteenth day of November in the year 1907, and also on the sixth and seventh days of April in the year 1908; that he, said Milton Daily, was not in the State of Michigan on any day in the year 1907 or on any day in the year 1908 except on said two or three different days prior to the said twenty-fourth day of June in the year 1907 and except on said twenty-second day of July in the year 1907 and on said fourteenth day of November, in the year 1907, and except on said sixth and seventh days of April in the year 1908, and that he, said Milton Daily, has not been in the State of Michigan on any day in the year 1909. (Trans. Rec., 53.)

"And said Milton Daily in further answering said return states that he, said Milton Daily, was not in the State of Michigan at the time

when, if ever, said alleged crime of bribery was committed, or at the time when, if ever, said alleged crime of obtaining ten thousand dollars in money by false pretences was committed, or at the time when, if ever, said sum of fifteen hundred dollars was given to said Allen N. Armstrong, or at the time when, if ever, the alleged false pretences specified in 'Indictment Exhibit B' were made, or at the time when, if ever, said sum of ten thousand dollars was obtained from the People of the State of Michigan, or at the time when, if ever, any one or more of the alleged corrupt agreements or understandings stated in 'Indictment Exhibit A' or in 'Indictment Exhibit B' or in said affidavit of said Allen N. Armstrong were entered into or made, or at the time or times when, if ever, anything was said or done in furtherance of or concerning any of said alleged corrupt agreements or understandings, or at the time when, if ever, said Milton Daily (meaning the plaintiff in this *habeas corpus* proceeding) as it is stated in Allen N. Armstrong's affidavit 'informed this deponent' (meaning said Allen N. Armstrong) 'that he' (meaning said Allen N. Armstrong) 'and the Board of Control of the Michigan State Prison at Jackson were making a mistake in purchasing all new materials as the Ayton machinery owned by said Milton Daily' (meaning the plaintiff in this *habeas corpus* proceeding) 'was practically as good as new and that if this deponent' (meaning said Allen N. Armstrong) 'would permit said Milton Daily' (meaning the plaintiff in this *habeas corpus* proceeding) 'to substitute said Ayton machinery for an equal amount of new machinery in the event a contract was made for the purchase of new machinery for the manufacture of twine and cordage at said prison he, the said Milton Daily' (meaning the plaintiff in this *habeas corpus* proceeding) 'would make this deponent' (mean-

ing said Allen N. Armstrong) 'a present of at least one thousand dollars and possibly more.' (Trans. Rec., 54.)

"And the said Milton Daily in further answering said return states, that the facts and matters alleged in said 'Indictment Exhibit A' do not constitute the crime of bribery or any other crime under the laws of the State of Michigan, and that the facts and matters alleged in 'Indictment Exhibit B' do not constitute the crime of obtaining money by false pretences or any other crime under the laws of the State of Michigan.

* * * * * * * *

"And said Milton Daily in further answering said return, states that the Governor of the State of Illinois did not have the jurisdiction and power to issue said extradition warrant, and that said extradition warrant is void and without authority of law, and that the custody, detention and restraint of said Milton Daily by said Christopher Strassheim, said sheriff, under and by virtue of said extradition warrant, is in violation of the Constitution and laws of the United States and of the State of Illinois because of the facts, matters and things hereinbefore stated, and more particularly for the following reasons (Trans. Rec., 55):

"(a) Because the facts and matters alleged in 'Indictment Exhibit A' do not constitute the crime of bribery or any other crime under the laws of the State of Michigan.

"(b) Because the facts and matters alleged in 'Indictment Exhibit B' do not constitute the crime of obtaining money by false pretences or any other crime under the laws of the State of Michigan.

"(b-1) Because it does not appear from the papers which accompanied and were annexed to said requisition that he, said Milton Daily, stands charged in the State of Michigan with

the commission of any crime under the laws of the State of Michigan.

"(c) Because it does not appear from what is stated in said requisition and in the said papers which accompanied and were annexed to said requisition that he, said Milton Daily, was corporeally within the State of Michigan on the day on which it was averred in 'Indictment Exhibit A' that said alleged crime of bribery was committed, or on any day on which it is averred in 'Indictment Exhibit B' that the said alleged crime of obtaining ten thousand dollars in money by false pretences was committed, or on the day on which it is averred in 'Indictment Exhibit B' that said alleged false pretences stated in 'Indictment Exhibit B' were made, or on the day on which it is stated in said affidavit of said Allen N. Armstrong that Milton Daily (meaning the plaintiff in the *habeas corpus* proceeding) gave said Allen N. Armstrong the sum of fifteen hundred dollars.

"(d) Because it does not appear from what is stated in said requisition and in said papers which accompanied and were annexed to said requisition that he, said Milton Daily, was a fugitive from the justice of the State of Michigan within the meaning of the Constitution and laws of the United States.

"(e) Because it appears from all the facts and matters hereinbefore stated and alleged that he, said Milton Daily was not, at the time of the issuance of said extradition warrant, and is not now, a fugitive from the justice of the State of Michigan within the meaning of the Constitution and laws of the United States.

"And said Milton Daily in further answering said return states, that the imprisonment and detention complained of by him, said Milton Daily, in the petition for said writ of *habeas corpus* was solely by virtue of said extradition warrant issued by the Governor of the State of

Illinois upon and in pursuance of the said requisition of and from the Governor of the State of Michigan. (Trans. Rec., 56.)

"All of which said matters and things in this answer contained the said Milton Daily is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and prays to be hence dismissed and discharged without further day. MILTON DAILY.

Appended to the amended answer is an affidavit of Milton Daily, in the usual form.

The hearing of evidence by the District Court in support of the amended answer of Daily to the return of Christopher Strassheim, sheriff, and in support of said return began October 25, 1909, and ended October 26, 1909. Thereupon the cause was continued from time to time until November 10, 1909, on which day was entered the final order of the District Court, discharging Daily from the custody of said sheriff, under and by virtue of the said extradition warrant. (Trans. Rec., 56-58.)

On November 10, 1909, this appeal was allowed and Daily was admitted to bail, pending the appeal. (Trans. Rec., 60-65.)

By stipulation the time to prepare and file the bill of exceptions was continued from time to time until March 1, 1910, on which day it was filed.

4. *Evidence was offered by Daily at the hearing in the District Court on the writ of habeas corpus to prove that Daily is not a fugitive from the State of Michigan, that is to say, to prove:*

1. That Daily does not stand charged in Michigan with the commission of the crime of obtaining

$10,000 from the people of the State of Michigan by false pretences.

2. That Daily was not corporeally in Michigan on May 1, 1908, or any other day when, if ever, said crime was committed, assuming that Daily is charged in Michigan with the commission of such crime.

3. That Daily was not corporeally in Michigan on May 13, 1908, or on any other day when, if ever, the crime of giving $1,500 to Armstrong as a bribe was committed.

All the matters stated and implied in the last three foregoing propositions, marked above 1, 2 and 3, were clearly and conclusively established at the hearing in the District Court by evidence offered thereon in behalf of Daily. Said evidence consisted of a certified copy of the requisition of and from the Governor of the State of Michigan, and of all the papers annexed thereto, together with the testimony of Daily and other witnesses. The testimony of Daily was confirmed in all respects, it is insisted, by the testimony of Armstrong, who was called as a witness on behalf of the appellant, Strassheim.

The requisition and the papers annexed thereto will be found in the bill of exceptions on pages 68-89 of the Transcript of Record.

The testimony of Daily will be found in the bill of exceptions on pages 125-141 of the Transcript of Record.

The testimony of Armstrong, who was cross-examined by the judge presiding in the District Court, but not by counsel for the appellee, will be found on pages 141-144 of the Transcript of Record.

A more particular statement of so much of said

evidence and testimony as seems to be relevant is as follows:

(a.) The indictment for obtaining $10,000 by false pretences. In each count of this indictment it is alleged that Armstrong, Daily and Eminger, on May 1, 1908, in Jackson, Jackson County, Michigan, did falsely pretend certain matters (*the person or body, if to any person or body, to whom, or to which they did so pretend, not being mentioned*) and did thereby on said May 1, 1908, obtain $10,000 from the State of Michigan. The substance of the alleged false pretence is that the machinery installed in the prison at Jackson, Michigan, by the Hoover & Gamble Company, was new and unused and complied with the terms of the contract between the Board of Control and said Company, whereas said machinery was not new but was second hand, used and worn and did not comply with the terms of the contract. How old said machinery was, or to what extent it was second hand, or had been used and worn or in what particular it did not comply with the requirements of the contract, is not averred. (Trans. Rec., 82-84.)

(b.) The indictment for bribery. The material averment in each count of this indictment is that Daily, on May 13, 1908, in Jackson, Jackson County, Michigan, *did give* to Armstrong, the warden of the Michigan state prison in said county, the sum of $1,500 as a bribe with intent to influence said Armstrong's conduct as such warden. In no count of the indictment for bribery is it alleged that Daily promised or offered a bribe to Armstrong.

(c.) The contract between the Board of Control and the Hoover & Gamble Company. In every count

of the indictment for obtaining the $10,000 in money by false pretences a portion of the substance of the contract between the Board of Control and the Hoover & Gamble Company is averred and counted upon. In the first, second and third counts of the indictment for bribery the substance of said contract is averred and counted upon. In the fourth count of the indictment for bribery said contract is counted upon and is set forth *verbatim*. The fourth and sixth articles of the contract, as set forth in the fourth count of the indictment for bribery, are respectively as follows:

"FOURTH.

"It is further mutually agreed by and between the parties hereto that the said party of the second part *guarantees* the machinery above mentioned to be a complete plant for the manufacture of binder twine and capable of producing 9,600 lbs. of merchantable twine in a working day of eight hours with a sufficient force of operatives. Also that the said party of the second part *guarantees* that all the machinery above mentioned shall be constructed in a thorough manner free from any defects of materials or workmanship and finished in a first-class manner, also that it shall be of the latest approved patterns."

* * * * * * * *

"SIXTH.

"It is further mutually agreed by and between the parties hereto that in consideration of the performance by the party of the second part of the covenants and agreements herein contained the party of the first part shall pay to the party of the second part the sum of twenty-nine thousand six hundred and eighty dollars ($29,680.00) as follows: Full payment shall be made upon receipt of each bill of lading for the

machinery shown on such bill until 75% of the total amount shall have been paid. The remaining 25% shall then be retained until the machinery is all installed and tested, and operating, so as to fulfill the *guarantees* above given, to the satisfaction and approval of C. G. Wrentmore, Cons. Engr. of the Board of Control." (Trans. Rec., 78.)

The contract price was $29,680. The price stated in the bid for that contract was $29,105. The reason for this difference in the price is the requirement in the contract of a greater number of machines than were offered to be furnished in the bid.

Said contract, it should be remembered, is incorporated *verbatim* into the indictment for bribery and is, in general terms, incorporated into the indictment for obtaining the $10,000 by false pretences and is counted upon in both indictments and was received in evidence, because it was so embodied in both indictments. It was not offered in evidence, *aliunde* the requisition and the papers annexed thereto, in order to disprove any matter, alleged and certified therein. On the other hand, that contract is an essential part of the papers, annexed to the requisition.

The only failure of performance on the part of the Hoover & Gamble Company, alleged in the indictments or disclosed by the evidence, annexed to the requisition or given upon the hearing on the writ of *habeas corpus*, is the failure to furnish *all new machinery*. It is conceded by the averments in the indictments for bribery and for obtaining the $10,000 by false pretences and by the evidence disclosed in the extradition and *habeas corpus* proceedings,

that all the promises and guarantees and provisions of the contract, except that all the machinery furnished and installed was not *new*, have been literally fulfilled by the Hoover & Gamble Company; that is, that all the machinery specified in the contract was furnished and installed and delivered f. o. b. cars at Miamisburg, Ohio, on or about the 22d day of January, 1908; that the Hoover & Gamble Company furnished a competent man to superintend the installation and erection of the machinery and to put the same in operation in a perfect and satisfactory manner; that the "machinery above mentioned" is "a complete plant for the manufacture of binder twine and capable of producing 9,600 pounds of mercantile" (meaning merchantable) "binder twine in a working day of eight hours with a sufficient force of operatives"; that "the machinery above mentioned" has been "constructed in a thorough manner *free from any defects of materials* or workmanship and finished in a first-class manner," and that the machinery above mentioned is of the "latest approved patterns"; and that "the machinery above mentioned" has been "tested, and operating, so as to fulfill the *guaranties* above given to the satisfaction and approval of C. G. Wrentmore, Cons. Engr. of the Board of Control."

d. The affidavit of Armstrong annexed to the requisition. The substance of this affidavit is as follows: Armstrong was warden of the State prison at Jackson, Michigan, from the first day of February, 1906, until the first day of February, 1909. The legislature of the State of Michigan in 1907 passed an act authorizing and directing the warden

and the Board of Control of the State prison at Jackson to use, purchase, erect, equip and maintain buildings, machinery, boilers and equipment necessary for the manufacture of twine and cordage together with a warehouse to be used in connection with said twine and cordage plant. This act went into effect on June 24, 1907. Pursuant to that act the warden and Board of Control called for and received bids for the equipment if a 120 spinner plant for the manufacture of twine and cordage at said prison together with the necessary preparing machines and bids were made by the Watson Manufacturing Company and the Hoover & Gamble Company, the latter through "*its sales agent* Milton Daily, of Chicago, Illinois." The Hoover & Gamble Company's bid for all new machinery was $29,805, and for part new and part used machinery $28,015. Prior to July 22, Daily appeared before the warden and the Board of Control at various meetings held for the purpose of considering the purchase of such machinery at Jackson and Detroit, in the State of Michigan. Finally the warden and Board of Control determined to purchase all new machinery, and "said Milton Daily, *as sales agent* for the said Hoover & Gamble Company, was requested to make a new bid for all new machinery, which he did under date of July 19, 1907, *as is set forth in the certified copy of the indictment hereto attached.*" "Said bid of the said Milton Daily under date of July 19, 1907, was duly accepted by the warden and Board of Control of said prison, with the addition of one drawing frame at $550, and one bell ringer at $25, making a total contract price the sum of $29,680,

and under date of July 22, 1907, the contract was duly entered into between the Board of Control of the Michigan State Prison and Hoover & Gamble Company for the purchase of such new machinery, *in the manner set forth in the certified copy of the indictment hereto attached.*"

He, Armstrong, learned from Daily that some three or four years prior to the making of said contract, Hoover & Gamble Company, through Daily as its agent, had installed at Ayton, Canada, a 60-spinner plant for the manufacture of twine and cordage; that said plant had been operated for only about 45 days, which machinery Daily had recently acquired by purchase. A few days prior to the acceptance of said bid of Daily, as above set forth, Daily informed (*place where not stated*) Armstrong that he and the Board of Control were making a mistake in purchasing all new machinery as the Ayton machinery owned by Daily was practically as good as new and that if Armstrong would permit Daily to substitute the Ayton machinery for an equal amount of new machinery, in the event a contract was made for the purchase of new machinery for the manufacture of twine and cordage at said prison he, Daily, would make Armstrong a present of at least $1,000 and possibly more. (Whether Armstrong told Daily in reply that he would accept the present or when, if ever, he said that to Daily, is not stated.)

After said contract was made Daily did substitute said second-hand machinery (*the time when, not stated*) for a like quantity of new machinery, and appeared at various times at the City of Jackson,

while the same was being installed and after it was installed. It was understood and agreed (*the time when, not stated*) between Armstrong and Daily that Armstrong was to refrain from communicating to the proper officers of the State of Michigan or to the Board of Control the fact of such substitution and to permit the Hoover & Gamble Company and Daily to retain the purchase price therefor.

The plant for the manufacture of twine and cordage commenced operations about March 17, 1908, "and the contract price paid (*place where not stated*) in full to said Hoover & Gamble Company." "Thereafter and on or about the 13th day of May, 1908, the said Milton Daily, as he had prior thereto agreed (*place where not stated*) to do, paid (*place where not stated*) this deponent the sum of fifteen hundred dollars."

Said affidavit of Armstrong lacks a statement of the place where the promise of the one thousand dollars and possibly more was made to Armstrong by Daily; and of the place where the agreement was made between Armstrong and Daily whereby Armstrong was to connive at the substitution of the Ayton machinery for an equal amount of new machinery, of the place where, on May 13, 1908, Daily "paid" Armstrong the $1,500, and of how or from whose hands Armstrong received the $1,500.

It appears from the testimony of Armstrong (next set out herein) at the *habeas corpus* hearing, that said promise was made in Chicago, Illinois, on or before July 19, 1907, and that Daily did not in person, if anyone did, pay to Armstrong $1,500 or any other sum of money and, from the claims of the

counsel for appellant made on the *habeas corpus* hearing, that Daily did not in person pay Armstrong the $1,500 or any other sum of money but that Daily sent the sum of $1,500 to Armstrong, Daily at the time being in Chicago.

e. The testimony of Armstrong at the *habeas corpus* hearing. Trans. Rec., 141.) Armstrong was the only witness called on behalf of appellant. The substance of Armstrong's testimony at the *habeas corpus* hearing is the following: Early in the year 1907, Armstrong made Daily's acquaintance through the installation of the binder twine plant in the Michigan State prison. Whether the first meeting between Daily and Armstrong was in Chicago or in Jackson, Armstrong did not know. Armstrong met Daily, in Chicago and in Michigan, three or four times before July 22, 1907. "Within ten days prior to the 22nd of July, 1907," in Chicago, Illinois, Armstrong had a conversation with Daily, which conversation was in Daily's office or on the streets of Chicago. In that conversation Armstrong notified Daily that the Board of Control had decided not to accept the Ayton machinery, and thereupon Daily stated to Armstrong, in substance, that the Board of Control was making a mistake not to accept his proposition to put in the Ayton machinery; that the Ayton machinery was as good as new machinery, as Mr. Wolfer (warden of the State prison at Michigan City, Indiana) had informed the Board of Control, and that he, Daily, thought it could be arranged to put it in and that there would be a nice present in it for Armstrong. About that time Armstrong saw Daily on more than

one occasion, for the reason that Armstrong went to Kansas City and stopped in Chicago both ways and saw Daily each time. Armstrong didn't remember whether he received Daily's bid after he had informed Daily that the Board of Control refused to accept the Ayton machinery or whether Daily brought the bid with him to Detroit, or whether the bid came to Mr. Wrentmore, the consulting engineer for the Board of Control.

When Daily said to Armstrong that there would be a nice present in it for him, Armstrong asked Daily what the amount was, and he thought Daily said "one thousand dollars anyway." That conversation about the $1,000 occurred in the City of Chicago, Illinois. Of that fact Armstrong was sure, but whether it occurred in Daily's office or on a street in Chicago Armstrong was not sure. (Trans. Rec., 142.)

(Whether Armstrong then and there agreed to accept the present or when he did, if ever, agree to accept the present, except that it is implied that he agreed to accept it at the moment on May 13, 1908, when the indictment alleges that it was given to him, the record is silent.)

Armstrong and Daily had talked also in Chicago about the hiring of a superintendent on Armstrong's trip to and from Kansas City. While Armstrong was in Kansas City he did hire a superintendent (for the binder twine plant).

Armstrong was present at a meeting of the Board of Control in Detroit prior to July 22, 1907. At that meeting bids were presented on behalf of two parties, the Hoover & Gamble Company, and the

Watson Manufacturing Company, the Hoover & Gamble Company presenting two bids, Armstrong thought. The bids were in writing. One of the Hoover & Gamble Company's bids included all the machinery located in Ayton, Canada, which was excluded by the other bid. Daily was not present in Detroit at that meeting *prior* to July 22, 1907, Armstrong impliedly testifies. (Trans. Rec., 142.)

Subsequently and prior to July 22, 1907, in Chicago, Illinois, Armstrong had a conversation with Daily about those bids, in which conversation Armstrong, acting on the instructions of the Board of Control, informed Daily that they had decided not to accept the bid including the machinery in Canada for the reason that in the sale of twine the International (Harvester Company) people might use it as a leverage against the prison-made twine, that they had installed old machinery and therefore could not make good twine, and in that conversation Armstrong asked Daily to make a bid not including that machinery, and at the same time informed Daily that the next meeting of the Board of Control would be on July 22. It was in the conversation in Chicago, related above in this paragraph, that Daily said that the Board of Control was making a mistake and that the other machinery was just as good.

Daily was present at the meeting of the Board of Control in Detroit, Michigan, on July 22, 1907. Armstrong did not remember about the modification of the bids nor did he recall meeting Daily on that day in Detroit before the meeting, but he did have a recollection of having some *correspondence* with Daily about where the meeting was to be held and

a faint recollection that he, Armstrong, was to meet Daily somewhere and show Daily where Navin's office (in Detroit) was, but as to meeting Daily, as stated by Daily in his testimony yesterday, at the Wayne Hotel and going up with him, Armstrong did not remember that.

After July 22, 1907, Armstrong did not again meet Daily until about the middle of the fall, in the month of November, 1907, at which time Armstrong had a conversation with Daily. Armstrong would not be positive and could not remember whether that conversation was in Jackson, Michigan, *or* whether it was over the 'phone, *or* whether it was in the City of Chicago, Illinois. That conversation was about a conversation which Daily had with Eminger, the secretary of the Hoover & Gamble Company. To the best of Armstrong's recollection that conversation was in Jackson, Michigan. (Trans. Rec., 143.) In that conversationDaily stated that when the Hoover & Gamble Company received the contract (some time in August, 1907) Mr. Eminger, the secretary, had objected to the word "new," referring to the machinery, and was afraid that they would have trouble with the consulting engineer in regard to the matter, and that Armstrong told Daily that he did not think that they would have any trouble with him.

Armstrong also thought he must have talked with Daily at that time about having trouble getting the buildings completed for the plant. Armstrong knew he "had some *correspondence* with Daily in regard to holding up the machinery and also holding up shipments of sisal." Armstrong did not remember

talking to him at that time, but he would not say that he did not.

The next time after November, 1907, that Armstrong saw Daily was the following spring after the machinery had been installed and started, about the fore part of April (1908). Armstrong did not know what the occasion was of Daily's coming, nor on that occasion did he have any talk with Daily about the machinery. On that occasion Armstrong met Daily in Armstrong's office in the prison, where at that time the Board of Pardons was in session. The secretary of the Board of Pardons notified Armstrong that Daily was outside. Thereupon Armstrong walked out of his office, met Daily, and Daily simply introduced him to Eminger, and Armstrong thought that he, Armstrong, then passed Daily and Eminger through the prison, that he did not go into the plant with Daily and Eminger, and on that occasion did not have any conversation with them in regard to the machinery. Armstrong thought that on that occasion there was a third party present with Daily and Eminger; that he would not want to say whether Governor Warner or Mr. Merriam was there that day or not.

Subsequent to July 22, 1907, Armstrong did not meet Daily at any time in the State of Michigan, except in the middle of November, 1907, and in the early part of April, 1908.

In answer to questions put to Armstrong by Judge Landis, Armstrong testified that to the best of his recollection he never had any talk with Daily in the State of Michigan about the present of a thousand dollars, and that he, Armstrong, did not on any occa-

sion have any conversation with Daily in the State of Michigan respecting anything in the way of any irregularity in connection with the installment of the machinery in the State prison at Jackson, Michigan, unless the conversation which Armstrong and Daily had in regard to the talk between Eminger and Daily about the word "new" occurred in Jackson, and that to the best of Armstrong's recollection that conversation between him and Daily about the word "new" in the contract occurred in Jackson, but that he, Armstrong, would not be positive in regard to that matter. (Trans. Rec., 143-144.)

f. Certain concessions and claims made in behalf of appellant at the *habeas corpus* hearing.

It ought to be added, perhaps, that the cross examination of Daily at that hearing assumed and conceded that Daily was not in Michigan either on May 1, 1908, or on May 13, 1908, and sought to elicit from him evidence that he, Daily, had on some other day than said May 1st or May 13th, done an act which was "the juridical cause" of the crime sought to be charged in the two indictments. The cross-examination of Daily also sought to prove that Daily sent his son from Chicago to Armstrong on May 13, 1908. This Daily denied. (Trans. Rec., 140.) Daily's denial is all the evidence there is in the record on that point. Nevertheless, counsel for appellant at page 3 of their brief state that "Armstrong * * * received through the hands of the son of Daily a present of $1,500 in money."

Armstrong did not testify at the hearing, nor was there any evidence, direct or circumstantial, offered at the hearing which tended to prove, that Arm-

strong, in any way, directly or indirectly, gave Daily to understand or infer that he, Armstrong, *accepted* Daily's implied proposal to make him a present of a sum of money, if he, Armstrong, would connive at the putting in of the Ayton machinery. Nor is there any evidentiary fact in the record, not even in Armstrong's affidavit annexed to the requisition, tending to prove that Armstrong accepted the said implied proposal of Daily. What does appear on this point in said affidavit is stated therein by way of conclusion, that is, "It was agreed and understood," etc. (Trans. Rec., 87.)

Said conclusion should be rejected as evidence because it is a conclusion of law. No indictment for perjury could be sustained upon that statement in the affidavit. An affidavit is a statement of facts, to the knowledge of the affiant. The statement in said affidavit that "Daily did substitute such second-hand machinery for a like quantity of new machinery" is a recital of a fact. But it is not stated in that affidavit how or when Armstrong learned that fact. It is consistent with all the facts in the record that Armstrong was informed of that fact by some employe of the Hoover & Gamble Company.

It is contended in the brief of argument on behalf of the appellee that Armstrong's testimony at the hearing makes necessary the rejection, as evidence, of the affidavit of Armstrong, annexed to the requisition.

g. Daily had two or three conversations in Michigan, in the year 1907, and prior to June 1, 1907, concerning the binder twine plant to be installed in the Michigan State prison. These conversations

were held at Detroit and Jackson, with different persons, namely, Armstrong, the Governor of Michigan, Wrentmore and the several members of the Board of Control. The last of these conversations in Michigan was before June 1, 1907. (Trans. Rec., 131.)

Daily was at Detroit, Michigan, on July 22, 1907, at Jackson, Michigan, Nov. 14, 1907, and April 6 and 7, 1908, and at no other time at any place in Michigan since said April 7, 1908. Daily was not in Michigan at any time in June, 1907, or on July 18, 19 or 20, or at any time during the first twenty days of July, 1907. At no time when he, Daily, was in Michigan was anything said or done by him to or in connection with Armstrong, or any other person, concerning the alleged present of a thousand dollars or more to Armstrong, or concerning any irregularity or wrong doing in connection with the performance of the Hoover & Gamble contract. The evidence in the record which supports the ultimate facts, above stated in this paragraph, immediately follows.

It is stated on page 14 of brief for appellant that "Daily tendered the bid" (meaning his second bid which was accepted) "in person within the State of Michigan." Upon said statement, which is contradicted by all the evidence in the record, and which there is no evidence whatever in the record to support, counsel for appellant builds his entire theory of the case by the following statement on said page 14, towit: "thus setting in motion the machinery by which the result was ultimately to be accomplished."

Counsel for appellant does not state on what day or at what place in Michigan "Daily tendered the

bid in person in Michigan." It is necessary, therefore, to call the court's attention to all the evidence in the record on the point in question.

Daily was in Michigan in the month of July, 1907, only on one occasion, namely, at the meeting of the Board of Control at Detroit on July 22nd. Daily arrived at Detroit on that occasion some time during the night of July 21st or on the morning of July 22nd; but he did not meet Armstrong or any other person at Detroit until the morning of July 22nd. As to this point the evidence is all one way. Testimony of Daily (Trans. Rec., 126, 131, 132). Testimony of Armstrong (Trans. Rec., 141, 142, 143).

Daily in his testimony said: "The bid of July 19, 1907, was sent in to the Board of Control in my name." (Trans. Rec., 133, 134.) By that sentence Daily did not mean that he, while at Detroit, sent the bid in to that meeting. That sentence means simply that the bid had been sent to the Board of Control in Daily's name, not that it was sent to the Board of Control by Daily, while Daily was present at that meeting. Considered only in the light of its immediate context in the bill of exceptions, that sentence might mean that the bid was sent in to the Board of Control, while Daily was present somewhere near the place of the meeting of the Board of Control. But what is really meant by that sentence is readily ascertained from all the evidence in the bill of exceptions as to the time when, the place at which and the manner in which that bid was sent to the Board of Control. Considering all of the evidence on said point, it is clear that our interpretation of that sentence is correct.

The fact is that that bid was sent July 19, 1907, from Chicago, Illinois, by mail. It is in the form of a letter, addressed to Armstrong, and dated "Chicago, Ill., July 19, 1907." (Trans. Rec., 76.) Daily testified on the hearing that he sent that bid by mail from Chicago, Illinois. (Trans. Rec., 131, 132.) And Armstrong testified: "I could not say whether I received Mr. Daily's bid after I had informed him that the Board of Control refused to accept the Ayton machinery, or whether he brought it to Detroit, Michigan, with him, or whether it came to Mr. Wrentmore." (Trans. Rec., 142.) Armstrong had informed Daily of the Board of Control's refusal to accept the Ayton machinery in Chicago about ten days prior to July 22, 1907. (Trans. Rec., 141.)

On that morning of July 22, 1907, Daily met Armstrong at the Wayne Hotel at Detroit, and walked with Armstrong up to the office of Mr. Navin, a member of the Board of Control, which office was at Detroit, Michigan. In the office of Mr. Navin on that day Daily met Armstrong, Wrentmore, the consulting engineer for the State of Michigan, the different members of the Board of Control and the Governor of Michigan. Nothing was done at the office of Mr. Navin on that day, except to open the second bids and to award the contract to the Hoover & Gamble Company. (Trans. Rec., 131-132.)

This is confirmed by Armstrong's testimony. (Trans. Rec., 141-143.)

Daily left Chicago on the night of November 13, 1907, arrived that night at Jackson, Michigan, and, on the morning of November 14, after getting break-

fast at the hotel, went out to the State prison and there met Armstrong. Daily made that trip to Jackson, Michigan, at the request of Armstrong, which request was made to Daily by Armstrong over the telephone. Over the telephone, Armstrong being at Jackson and Daily being in Chicago, Armstrong said to Daily that he wanted to see him about the congested condition of the warehouse in the prison; that they had been receiving sisal and had it stored all over town and that they were paying storage on it. and that he, Armstrong, could not just explain the situation, but he wanted Daily to come there and see if he, Daily, could not help them out in some way.

On arriving at the prison at Jackson, Michigan, on the morning of November 14, 1907, Daily was informed by Armstrong that the building wherein was to be installed the machinery for the making of twine was not finished and that it would not be finished for some time; that the machinery was coming in; that it was very heavy; that they were storing it in the warehouse intended for the twine and fiber; that the warehouse was full, and he wanted Daily to try to stop further shipments of machines and hemp. Up to that time the Board of Control had bought about 4,000 bales of sisal because the sisal was cheap.

Daily went through the prison door, being passed through by Armstrong, Armstrong not going with him, to the warehouse and examined its condition. When Armstrong passed Daily through the prison door Armstrong told the guard to remember when Daily came back to let him come through.

After examining the congested condition of the warehouse Daily decided to stop, and did stop, temporarily, the further shipments of machines from the works of the Hoover & Gamble Company at Miamisburg, Ohio, to Jackson, Michigan, and also further shipments of sisal from Mexico to Jackson, Michigan. At that time there were a thousand bales of sisal on the way from Mexico to Jackson, Michigan, which thousand bales were then in a ship on the Gulf of Mexico, and in transit to Mobile, Alabama. Daily caused that sisal to be stored at Mobile, Alabama.

The foregoing was all that took place between Armstrong and Daily at Jackson, Michigan, on November 14, 1907, according to the testimony of Daily. (Trans. Rec., 132-133.)

Daily's account of what took place at Jackson, Michigan, on November 14, 1907, is confirmed by the testimony of Armstrong. (Trans. Rec., 143.)

It will be remembered that Armstrong testified that in November, 1907, he had a conversation with Daily about the word "new" in the contract, which took place either over the telephone, or in Chicago, Illinois, or in Jackson, Michigan, and to the best of Armstrong's recollection in Jackson, Michigan. Daily was not cross-examined respecting said conversation, but it will be observed that Daily testified without having any intimation whatever of the testimony which would be given by Armstrong, that he, Daily, was requested by Armstrong, over the telephone, to go to Michigan in November, 1907.

During the cross-examination of Daily, Daily, in substance and effect, denied that he ever had a con-

versation of any kind with Armstrong respecting the word "new" in the contract. On cross-examination Daily was asked whether or not, at some time or other Armstrong did not know of the substitution of the machinery, and Daily replied "Not from me." (Trans. Rec., 140.)

Again, Daily was asked during that cross-examination whether or not Armstrong did not know of the substitution of the Ayton machinery some time or other during the completion of the contract, and Daily replied that he, Daily, did not know that Armstrong ever knew it. Daily also in his cross examination answered that there was no understanding between him and Armstrong that the Ayton machinery was included in the bid, which was opened on July 22, 1907. (Trans. Rec., 139.) The force and effect of Daily's testimony on said point is due in some measure to the fact that Daily had no information of any kind or nature as to what testimony Armstrong would give concerning any such matter as a conversation about the word "new" in the contract. No such conversation, it will be observed, is set forth in the affidavit of Armstrong, annexed to the requisition.

On April 6, 1908, the binder twine plant being then installed and in operation at the prison, Daily went from Chicago to Jackson, arriving at Jackson on the evening of April 6, at which time he there met at the hotel Eminger, the secretary of the Hoover & Gamble Company. The purpose of the meeting with Eminger was the joint examination of the operation of the binder twine plant at the prison.

On April 7 Daily and Eminger walked through the

binder twine plant with the Governor of Michigan, Wrentmore, the Consulting Engineer of the Board of Control, and the members of the Board of Control. At the prison on April 7, 1908, Daily and Eminger met Armstrong, and it appears that no conversation of any consequence occurred between Daily, Eminger and Armstrong. As Armstrong in his testimony puts it, "Daily simply introduced me to Mr. Eminger and I think that I passed them through the prison." (Trans. Rec., 136-137, 143.)

There was no cross examination of Armstrong by counsel for Daily. A few questions were put to Armstrong by the court after his direct examination had been concluded. In response to those questions put to Armstrong by the court Armstrong testified that he did not at any time have a talk with Daily in the State of Michigan about this present of a thousand dollars; that to the best of his recollection he, Armstrong, did not have any conversation with Daily in Michigan at any time on that subject; and that he, Armstrong, did not have any conversation with Daily in the State of Michigan at all respecting anything in the way of any irregularity in connection with the installation of the machinery at the prison, unless the conversation that he and Daily had in regard to the talk that Daily had with Eminger (about the word "new" in the contract) took place in Jackson, and that to the best of Armstrong's recollection that conversation between him and Daily took place in Jackson. (Trans. Rec., 143-144.) Said last sentence should be read in connection with all of Armstrong's testimony on that point. Previously on the hearing Armstrong testified that said conversation

between him and Daily took place in Jackson or over the telephone or in Chicago, but to the best of his recollection at Jackson; but that he wouldn't be positive, that he couldn't remember where it took place. (Trans. Rec., 143.)

h. General nature of the evidence received at the *habeas corpus* hearing on behalf of Daily, to prove that Daily was in Chicago, Illinois, May 1 and May 13, 1908. Counsel for appellant in their brief state that they do not contend that Daily was personally present in Michigan on the 13th day of May, 1908, but they nowhere admit in their brief nor did they formally admit at the hearing that Daily was in Chicago, Illinois, and not in Michigan, on May 1 and on May 13, 1908. It is therefore necessary, in the judgment of counsel for appellee, to set forth a brief statement of the evidence which conclusively proves that Daily was in Chicago, Illinois, and not in Michigan, on May 1 and May 13, 1908.

The testimony given by the witnesses on those points is confirmed by a deposit slip, dated May 1, 1908, containing thereon the handwriting of Daily and delivered on May 1, 1908, by Daily, together with the amount of money specified thereon, to the receiving teller of the Northern Trust Company's Bank, located and doing business in Chicago, Illinois; by an Adams Express Company's receipt, dated April 30, 1908, and with Daily's name written thereon by Daily on April 30, 1908, in Chicago, Illinois; by an entry in the diary of Leonard A. Busby, in Busby's handwriting, made on the afternoon of May 13, 1908; and by many other documents, produced before and examined by the District Court and op-

posing counsel on the *habeas corpus* hearing, and more particularly by the letter-press copies of numerous letters and telegrams dictated by Daily to Emma Hopp, his stenographer, and personally signed by Daily in his own handwriting in his office at 115 Dearborn street, Chicago, Illinois, on the days on which those letters and telegrams bear date, respectively. Every one of said letter-press copies contains a fac simile of Daily's signature on the corresponding original letter or telegram. The letter-press copies were made and kept in Daily's office at 115 Dearborn street, Chicago, Illinois, and were copied in the regular course of business for many years at said 115 Dearborn street by Daily's stenographer, Emma Hopp. The books containing those letter-press copies were produced on the *habeas corpus* hearing in the District Court for the inspection of the court and opposing counsel.

The evidence introduced on behalf of Daily, and referred to above, is set forth on 50 pages (pages 90 to 140 inclusive) of the printed abstract of the record.

Omitting the details of the evidence adduced on behalf of Daily, because of its nature and of its volume, there follows a condensed statement of *the ultimate facts, clearly and conclusively established by the evidence.*

Daily has been living in the City of Chicago, Illinois, continuously since 1891. During the years 1907-1909, and for many years prior thereto, Daily's residence was at 1624 Kenmore avenue, and his office at 115 Dearborn street, in the said City of Chicago. During said years he has been a "sales

agent'' (see Armstrong's affidavit), not a collecting agent, for the Hoover & Gamble Company, named in the indictment, and also an agent for Messrs. Avelino Montes S en C. Merida, Yucatan, Mexico, dealers in sisal hemp. For some years prior to 1908, as well as during 1908 and subsequently, Daily was a stockholder in the Mexican Nevada Exploration Company, the name of which company was subsequently changed to the San Jose Lumber Company, which company owned large tracts of valuable woodland in Mexico.

The witnesses Stanhope and Hoyer were also stockholders in that company, and the witness Yeates was on May 1, 1908, contemplating becoming and subsequently became a stockholder in that company, and a Mr. Tripp, of North Vernon, Indiana, was its president. Said Stanhope and Yeates, during the year 1908, and for many years theretofore, occupied an office adjoining the office of Daily at said 115 Dearborn street, Stanhope being a retired business man and Yeates being a timberland expert and in the real estate business. Throughout the year 1908, Daily kept his bank account in the bank of the Northern Trust Company, at La Salle and Monroe streets, in said City of Chicago; and during the year 1908, and for many years prior thereto, the witnesses Hoyer and Cohlgraff were partners and engaged in the real estate business, with their office at 1310 Sheridan Road, in said City of Chicago, and represented Daily in attending to such real estate business as Daily had in buying and selling real estate and in collecting rents from tenants in Daily's houses. Daily's residence at 1624 Kenmore avenue, is one

and a half blocks north and one block west from the office of Hoyer and Cohlgraff, at said 1310 Sheridan Road.

During the year 1908, and prior thereto, Daily was also trustee for the Brownsville Irrigation Company, which company, it appears, owned land in Cameron County, Texas. The witness Busby, a Chicago lawyer, of the firm of Shope, Zane, Busby & Weber, whose office was at 100 Washington street, in said City of Chicago, was also interested as a stockholder in the Brownsville Irrigation Company, and acted as counsel for Mr. Daily in all his legal matters.

Daily, at his office at said 115 Dearborn street, on the afternoon of April 30, 1908, received from said Mr. Tripp, from North Vernon, Indiana, by the Adams Express Company, a box of samples of wood, showing the different kinds of wood owned in Mexico by said San Jose Lumber Company. At the time Daily received that box he signed an express receipt therefor, which receipt was produced in evidence, a copy of which is set forth on page 92 of the transcript of the record. It was shown by the witnesses Clark and McWilliams, respectively, the agent and wagon driver of the Adams Express Company, in Chicago, that said box was delivered at Daily's office on April 30, 1908, and that the person who signed "Milton Daily" on said receipt was the person to whom that box was delivered. The signature, "Milton Daily," on that receipt was identified as the signature of Daily by Daily, Stanhope, Yeates and Emma G. Hopp, Daily's stenographer.

About nine o'clock on the morning of May 1, 1908, Daily carried that box of samples of wood from his

office into the adjoining office occupied by Stanhope and Yeates, in which latter office the box was at once opened and the samples of wood taken therefrom. On each sample was written, in Spanish by some Mexican engineer, the name of the kind of wood it was. Stanhope wrote upon each of said samples the English equivalent of the Spanish name, written thereon. And thereupon followed a general discussion among all the persons there present, namely, Stanhope, Yeates, Hoyer and Daily, as to said samples of wood and as to the profit there would be in disposing of the timber-land owned by them. Stanhope, Yeates, Hoyer and Daily remained in the office of Stanhope and Yeates discussing those samples of wood and their lumber project until about half past twelve in the afternoon of that day, May 1, 1908. At the last named hour the parties separated, went out and ate their luncheon and returned to the office of Stanhope and Yeates and continued the discussion of the samples of wood and their lumber project until the middle of that afternoon. In the afternoon of that day the witness Engs was also present in the office of Stanhope and Yeates and participated, among other things, with the persons there, in the conversation about those samples of wood. Engs states in his testimony the nature of his business with the witness Stanhope, which required him to meet Stanhope in Stanhope's office on May 1, 1908, and how he, Engs, fixes the date as May 1, 1908. (Trans. Rec., 105-106.) Daily and the witnesses, Stanhope and Yeates, fixed the dates of that conversation as May 1, 1908, by the date of said express company's receipt, Hoyer and Stan-

hope stating that Daily told them on the evening of April 30, 1908, that the samples had come. The witness Hoyer fixes the date of that conversation as May 1, 1908, in another way. Hoyer, as stated above, was a member of a firm who were Daily's real estate agents. On the morning of May 1, Hoyer went to Daily's office in order to see him about a tenant, named Dolff, who had moved out of one of Daily's houses at 1334 Byron street, in Chicago, April 30, 1908, owing Daily a month's rent. Hoyer talked with Daily about that matter of rent and was told by Daily to proceed to bring suit for it. Thereupon Hoyer, who had Dolff's lease with him, wrote upon that lease the following: "May 1/08. Saw Daily, Commence suit."

On April 29, 1908, Daily dictated, at his office at said 115 Dearborn street, to his stenographer, Emma Hopp, the letters marked respectively 4, 5 and 6, each bearing date April 29, 1908, and on April 30, 1908, the letters marked respectively 7, 8 and 9, each bearing date of April 30, 1908, and on May 1, 1908, the letters marked respectively, 10, 11, 12 and 13, each bearing date May 1, 1908, and on May 2, 1908, the letters marked respectively 14, 15, and the telegram marked 16, each bearing date May 2, 1908. (Trans. Rec., 106-117.) The letter-press copies of these letters and that telegram were each subscribed "Milton Daily," by Milton Daily, on the days on which they bear date, in his own handwriting, at his said office 115 Dearborn street. The latter statement is confirmed by the testimony of said Emma Hopp.

Daily's testimony confirms the foregoing testi-

mony. Daily also states that he was in said City of Chicago throughout the day and night of April 29, April 30, May 1 and May 2, 1908, spending each night at his said residence. (Trans. Rec., 125-129.)

When said persons in the office of the witnesses, Stanhope and Yeates, separated for luncheon, as stated above, at the noon hour on May 1, 1908, Daily went to said bank of the Northern Trust Company, in the City of Chicago, and made out, in his own handwriting, a deposit slip for $507.50, which deposit slip is dated May 1, 1908, and deposited on said May 1, 1908, to his credit in that bank, that slip and that amount of money. The deposit slip was produced from the vaults of said banking company, by the witness Rose, a messenger of said banking company, and was received in evidence. (Trans. Rec., 91.) The handwriting on that deposit slip was identified as Daily's handwriting by Daily. That bank closes its doors at three o'clock in the afternoon.

On May 1, 1908, Daily also, at his said office at 115 Dearborn street, in Chicago, drew and signed his name to and mailed a check for $50, payable to Geo. P. Smith, an attendant at the Dunning Insane Asylum of Cook County, Illinois, for certain commissions due from Daily to said Smith on sales of land made by said Smith for said Brownsville Irrigation Company. That check is dated "Chicago, May 1st, 1908." On May 5, 1908, Daily received a letter from said Smith which, following the letter head, reads as follows:

Dunning, 5/5-1908.

Milton Daily, 115 Dearborn Street, Chicago.

Dear Sir:—Yours of 1st enc. ck. for $50.00

rec'd. for which please accept thanks. Pardon *delay* in acknowledging. I am yours truly
GEO. P. SMITH."

That check and letter were received in evidence. (Trans. Rec., 127-129.)

Daily also testified that he was in Chicago, Illinois, at his office and elsewhere, during the day and evening, and at his residence by night, on May 12, 13 and 14, 1908, respectively.

In his office at said 115 Dearborn street Daily, on May 12, 1908, dictated to his stenographer, Emma Hopp, and in person signed his name to the letters and a telegram, each bearing date May 12, 1908, and respectively numbered 17, 18, 19, 20, 21 and 22; and on May 13, 1908, the letters and a telegram, each bearing date May 13, 1908, and respectively numbered 23, 24, 25, 26 and 27; and on May 14, 1908, the letters and a telegram, each bearing date May 14, 1908, and respectively numbered 28, 29, 30 and 31. (Trans. Rec., 117-125, 129-131.)

Between two and five o'clock on the afternoon of May 13, 1908, Daily called on his lawyer, Leonard A. Busby, at the office of said lawyer at 100 Washington street, in the city of Chicago, and there spent about an hour in conference with him. Daily had frequently consulted said Busby about his trusteeship for the Brownsville Irrigation Company. Daily, as trustee for that company, had been selling its land since late in the year 1906. He had sold one 600-acre tract, called Tract 128, to one Brownell, and received in payment therefor Brownell's notes with certain security. The first of Brownell's notes fell due about

the middle of May, 1908, and there was some question in the minds of Busby and Daily whether that note would be paid by Brownell, and also about the sufficiency of the security, and it was concerning the Brownell note and the security therefor, and also about the sale of a certain 745-acre tract of land belonging to the same company, and called the Rancho Ziejo Tract, that led Daily to call at the office of Busby on the afternoon of May 13, 1908. Busby was the largest stockholder in the Brownsville Irrigation Company.

Busby has for many years kept a diary in the regular course of his professional business as a lawyer, in which he has daily made entries concerning matters pertaining to his business. On May 13, 1908, Busby, in his own handwriting, made in that diary the following entry: "Saw Daily P. M. Says B. L. 1 notes are all right and that Brownell will need time but will pay. Hopes to sell the Rancho Ziejo tract."

It was the foregoing entry in the diary which enabled Busby to testify that he met Daily at his office in Chicago on the afternoon of May 13, 1908. That entry was received in evidence and that diary was inspected by the court and counsel for appellant. (Trans. Rec., 93-94.) Daily, having no recollection of the date of that call upon Busby, gave no testimony about it.

While the witness Busby was giving his testimony Mr. Barkworth, counsel for Strassheim, sheriff, said to the court in response to questions put to him by the court, that it was not contended on behalf of

Strassheim that Daily was in Michigan on May 13, 1908. Whereupon the following occurred:

> "The Court: As far as that is concerned the record may show that he was not in Michigan on that day?
>
> "Mr. Barkworth: I don't know that we want to admit that. *I simply say that we have no knowledge that he was in Michigan on that day.* I simply don't want to admit it as a matter of record. I don't want the record to show that we admit that he was not there on that day.
>
> "The Court: Will there be testimony on behalf of the State of Michigan that Daily was in Michigan on that day?
>
> "Mr. Barkworth: I think not, your Honor."

Hoyer and Cohlgraff kept their real estate office at 1310 Sheridan Road, in Chicago, open until eight o'clock every night except Sunday night for the accommodation of persons wishing to pay rent. Either Hoyer or Cohlgraff, not both of them, was in that office every night.

About seven o'clock on the night of Tuesday, May 12, 1908, Daily met Cohlgraff at said real estate office, whither Daily had gone for the purpose of talking over with Hoyer a certain deal, which is described in the testimony of Hoyer. After a short talk between Daily and Cohlgraff on the night of May 12, 1908, Cohlgraff closed his office and walked with Daily north on Sheridan Road (Sheridan Road being a street running north and south) as far as the next intersecting street north, which was Graceland Avenue. There Cohlgraff turned west (which was not his usual route home) to pay a small bill due from Cohlgraff to one Telfser, then doing business

at 1349 Graceland Avenue under the name of Sheridan Tailoring Company. Upon arriving at Graceland Avenue Cohlgraff expected Daily to turn west with him for the reason that so to do would be the shortest way home for Daily, Daily's residence being one block west and one and a half blocks north from the real estate office of Hoyer and Cohlgraff, but Daily, instead of turning west with Cohlgraff, bade Cohlgraff good-night and walked straight north on Sheridan Road; whereupon Cohlgraff asked Daily where he was going, and Daily said that he was going to (the witness') Stanhope's house. Stanhope's house was at 945 Alexander Place, east and south from Daily's house. After parting with Daily at the intersection of Sheridan Road and Graceland Avenue, Cohlgraff continued west to Telfser's place and then and there paid Telfser $4.50, owing to Telfser by Cohlgraff, for which payment Cohlgraff took from Telfser a receipt, which is dated May 12, 1908, was identified both by Cohlgraff and Telfser and is in evidence. (Trans. Rec., 99-101.) Stanhope testified that Daily was at his (Stanhope's) residence at 945 Alexander Place on the night of May 12, 1908, till about ten o'clock, playing billiards with Stanhope. Stanhope fixed that date by reference to the dates of a paper and letter, which are in evidence and are designated Stanhope 1 and Stanhope 2, respectively. (Trans. Rec., 103-105.)

On the morning of May 13, 1908, when Hoyer and Cohlgraff met at their real estate office, Cohlgraff told Hoyer that Daily wanted to see him about a deal, whereupon Hoyer said to Cohlgraff that he supposed it was that Byron street deal. There-

upon on the morning of May 13, 1908, Hoyer called up Daily on the telephone and was informed by Daily that he wished to see Hoyer about a deal which he had with reference to the Byron street property, and Hoyer told him that he would be at his office that night, and if he had time to drop in, and Daily said he would. On the night of May 13, 1908, Daily called at the office of Hoyer and Cohlgraff and there discussed with Hoyer a deal to sell his six-story flat building at 1334-1336 Byron street. The conversation about said deal at that time is related in the testimony of Hoyer and Daily. (Trans. Rec., 101-102, 129.) May 13, 1908, is Cohlgraff's birthday. Cohlgraff is Hoyer's brother-in-law. Hoyer made Cohlgraff a present of a box of cigars as a birthday gift on May 13, 1908, just about the hour of the morning of that day at which Hoyer called up Daily on the telephone. (Trans. Rec., 101-102.)

The witnesses Yeates and Stanhope also met Daily from time to time during the forenoon of May 13, 1908, at the office of Daily and at the office of Yeates at 115 Dearborn street, in the City of Chicago, and state in their testimony that they fix the time when they so met Daily as May 13, 1908, by reference to certain entries in Yeates' diary, made therein on May 13, 1908, which entries are in evidence. The Yeates diary was also produced and examined by court and opposing counsel. (Trans. Rec., 97-98, 103.)

BRIEF OF ARGUMENT.

A.

THE RULE OF LAW AS TO FUGITIVES FROM JUSTICE, APPLIED TO THE FACTS.

1. A fugitive from justice, within the meaning of Article IV, Sec. 1, Subd. 2, of the Constitution of the United States, and of the Act of Congress passed in pursuance thereof, is a person who stands charged by indictment or affidavit in the demanding state with committing a crime therein, and who was corporeally within that state at the time, when, if ever, the crime was committed, and has thereafter departed therefrom and is found in the surrendering state.

Hyatt v. *New York ex rel. Corkran,* 188 U. S., 691.

In re Palmer, 138 Mich., 36, cited on page 21 of brief for appellant, and all other decisions of courts which seem to hold that it is sufficient to show that the accused was in the demanding state *at or about the time* the offense was committed, are overruled by *Hyatt* v. *New York ex rel. Corkran, supra.*

Hayes v. *Palmer,* 21 App. Cases, D. C., 450, cited at page 20 in brief of counsel for appellant, follows the rule laid down in *Hyatt* v. *New York, ex rel. Corkran, supra,* applies said rule to the *continuing* offense of keeping a gambling house and holds the evidence produced to be insufficient to show that the relator, Hayes, was not in the demanding state at

the date stated in the indictment, namely, June 2, 1902. Daily is not charged in either indictment with a continuing offense, so that in no respect can the case of *Hayes* v. *Palmer, supra,* be held to be in point.

Ex parte Hoffstot, 180 Fed. Rep., 240, also follows the rule of the *Corkran* case and applies said rule to the offense of conspiracy, also a continuing offense. In that case the trial court held that there was evidence tending to prove that Hoffstot was in Pennsylvania while a material act was done in that state in furtherance of the conspiracy, and there was no evidence showing that Hoffstot was not in Pennsylvania at the time said act was done. That act was proof that Hoffstot had committed the crime of conspiracy, while he was corporeally in Pennsylvania. In the case at bar the trial court held the contrary, and all the evidence is that Daily was not in Michigan when the crime was committed.

As to the ultimate question see, also, *State* v. *Hall et al.,* 115 N. C., 811, as reported with footnotes in 28 L. R. A., 289. In those footnotes will be found a condensed statement of the points held in the different interstate extradition cases as late as 1894.

2. Assuming that Daily does stand charged, in one of the two indictments, annexed to the requisition, with the crime of obtaining by false pretences on May 1, 1908, $10,000 in money from the people of the State of Michigan, and in the other of said indictments with the crime of giving to Armstrong on May 13, 1908, $1,500 as a bribe, it was sufficient to entitle Daily to his discharge from the custody of Strassheim, sheriff, if Daily showed by clear and

conclusive proof that he was not corporeally within the State of Michigan, either on May 1, 1908, or on May 13, 1908, the days on which it is alleged, respectively, in the said indictments that he committed said crimes, sought to be averred therein, unless there were proof that said crimes were committed on some other days than those named in the indictments.

3. Clear and conclusive proof was offered to the District Court, and appears in the record, that Daily was not corporeally within the State of Michigan either on May 1, 1908, or on May 13, 1908; and there was no proof offered that Daily committed either of said crimes on any of the days on which it is shown by the evidence that he was corporeally within said state.

4. But Daily does not stand charged with committing any crime whatever in the State of Michigan by the indictment, annexed to the requisition, which purports to charge Daily with obtaining by false pretences $10,000 in money from the people of said state. Therefore, so far as said indictment is concerned, it is immaterial whether Daily, at any time, while corporeally in the State of Michigan, committed any crime against the laws thereof.

5. Daily does stand charged with the crime of bribery by the indictment, annexed to the requisition, which avers that Daily gave $1,500 to said Armstrong as a bribe on May 13, 1908. But Daily was not corporeally in the State of Michigan on May 13, 1908, or on any other day, when, if ever, said crime of bribery was committed. Therefore, so far as said

indictment for bribery is concerned, Daily is not a fugitive from the justice of the State of Michigan.

6. Daily did not at any time, while he was corporeally in the State of Michigan, do any act, which amounts to the commission of said crime of bribery, or of said crime of obtaining $10,000 by false pretences, or any other crime, within the meaning of said article of the Constitution of the United States, and of said Act of Congress; in other words, Daily did not, while corporeally in the State of Michigan, do any act, which was *the juridical cause* of either of said crimes.

7. Counsel for appellant waive, by their statement on page 6 of their brief, the question as to the jurisdiction of the District Court, assigned for error in the first of the assignment of errors. (Trans. Rec., 60.) Therefore, that question is not argued herein.

B.

CONTENTIONS ON BEHALF OF STRASSHEIM, APPELLANT.

It is contended on behalf of Strassheim, sheriff, the appellant, that:

1. Daily stands charged, in Michigan, by the two indictments, annexed to the requisition, with committing, in Michigan, the crime of obtaining, on May 1, 1908, $10,000 in money, by false pretences, and the crime of bribing Armstrong on May 13, 1908.

2. Even if the proof shows that Daily did not commit those two crimes on the days specified in the indictments, yet, what Daily did in Michigan on each and every one of three different days, namely, at Detroit, on July 22, 1907, at Jackson, in November, 1907, and again at Jackson, on April 7, 1908, amounts

to and constitutes the commission of each of said two crimes.

3. Therefore, Daily being found in Illinois, is now and has been continuously since May 1, 1909, the day on which the indictments were returned by the grand jury, a fugitive from the justice of the State of Michigan.

C.

REPLY TO CONTENTIONS ON BEHALF OF STRASSHEIM. CONTENTION ON BEHALF OF DAILY AS TO THE NATURE OF THE ACT, NOT BEING THE ACT WHICH CONSUMMATES THE CRIME CHARGED, YET AMOUNTS TO THE COMMISSION OF THE CRIME CHARGED.

1. It is conceded that Daily stands charged by indictment in Jackson County, Michigan, with committing, in said county and state, the crime of giving $1,500, as a bribe, to Armstrong on May 13, 1908. But it is contended that Daily is not a fugitive from the justice of the State of Michigan because or on account of the crime charged in said indictment, for the reason that the evidence, produced by Daily upon the hearing of the writ of *habeas corpus* in the District Court and set forth in the bill of exceptions incorporated into the record in this case, clearly and conclusively shows that Daily was not corporeally within the State of Michigan either on May 13, 1908, or at the time when, if ever, said crime of giving a bribe to Armstrong was committed.

2. It is further contended that Daily does not stand charged in Jackson County, Michigan, with committing, in said county and state, the crime of obtaining $10,000 from the people of the State of Michigan by false pretences on May 1, 1908; but, as-

suming that Daily is so charged with the commission of said crime on May 1, 1908, it is contended that Daily is not a fugitive from the justice of the State of Michigan, because the evidence produced upon the hearing of the writ of *habeas corpus* in the District Court and incorporated into the bill of exceptions in the record in this case, clearly and conclusively shows that Daily was not corporeally within the State of Michigan either on May 1, 1908, or at the time when, if ever, said crime of obtaining $10,000 from the people of the State of Michigan by false pretences was committed.

3. It is further contended on behalf of Daily that the committing of a crime, within the meaning of the laws governing interstate extradition, means either the committing of the act which is the consummation of the crime, to-wit, the actual obtaining of the $10,000 by false pretences or the actual giving of the $1,500 or the committing of an act that was *the juridical cause* of the actual obtaining of the $10,000 by false pretences, or, if any such act is possible other than procuring another person so to do, of the actual giving of the $1,500 as a bribe.

The crime of obtaining money by false pretences is made up of at least two acts, so far as the accused alone is concerned, which may be committed at different times. In this respect, said crime is like the crime charged in the *Cook* case, 49 Fed. Rep., 833, 843. On the other hand, the crime of bribery charged consists of a single act, the act of giving, so far as the accused is concerned.

4. It is also contended on behalf of Daily that what Daily did in Michigan on each and every one

of said three days, namely, at Detroit on July 22, 1907, at Jackson in November, 1907, and again at Jackson on April 7, 1908, was not the juridical cause of the actual obtaining of the $10,000 by false pretences or the actual giving of the $1,500 as a bribe.

D.

QUESTIONS RAISED ON THE RECORD.

The following questions are therefore raised on the record and presented to this court for its decision, namely:

1. Does the indictment, annexed to the requisition, for obtaining the $10,000 by false pretences charge that crime or any other crime?

2. What is the nature and character of the act, if any, which, although it is an act short of the actual commission of the crime charged in an affidavit or indictment, yet amounts to and constitutes the commission of such crime, within the meaning of said Article of the Constitution of the United States and of said Act of Congress?

3. Did Daily, on any day, while he was corporeally in the State of Michigan, do any act which amounts to and constitutes the commission of said crime of bribery, although it was an act short of the actual giving of the $1,500 to Armstrong?

4. Assuming that Daily stands charged, by one of the indictments, annexed to the requisition, with obtaining $10,000 from the people of the State of Michigan by false pretences, did he, while corporeally in the State of Michigan, do any act which amounts to and constitutes the commission of said crime, within the meaning of said Article of the Constitu-

tion of the United States and of said Act of Congress, although it was an act short of the actual obtaining of the $10,000 by false pretences?

5. All the other questions decided by the District Court, being questions of fact, were conclusively determined in favor of Daily by the final order of the District Court.

E.

THE INDICTMENT FOR FALSE PRETENCES DOES NOT CHARGE A CRIME.

1. The indictment for obtaining the $10,000 by false pretences, tested, not as a pleading but by the rule laid down in *Pierce* v. *Creecy*, 210 U. S., 387, 402, does not charge a crime, either upon its face or when considered in the light of the contract between the Board of Control and the Hoover & Gamble Company, generally described in that indictment and set forth *verbatim* in the fourth count (Trans. Rec., 76-79) of the indictment for bribery.

It is assumed that "substantially charged," within the rule laid down in *Pierce* v. *Creecy*, *supra*, means that facts, which make up the supposed crime, are substantially *stated* in the indictment.

2. The indictment for obtaining $10,000 by false pretences does not, tested by said rule, charge a crime, for the following reasons:

a. It lacks the name of the person, or officer, or body of officers, of the State of Michigan, to whom the alleged false statement was made. Therefore the indictment fails to show that there was a false pretence in the transaction described. That is, it appears upon the face of every count that one es-

sential element of the offense sought to be charged is wanting, to-wit, a false pretence. This has been expressly held in the three following cases, the first two of which are Crown Cases Reserved. Bishop also so states the rule.

Reg. v. *Sowerby,* 17 Cox C. C., 767.
Reg. v. *Silverlock,* 18 Cox C. C., 104.
In re Schurman, 40 Kan., 533.
2 Bish. New Crim. Proc., Sec. 173 (3).

It is not conceivable that there was a false pretence unless there was a false statement actually made to some person. In *Reg.* v. *Sowerby, supra,* it is said by Lord Coleridge, C. J., speaking for the full court:

> "Now, a pretence means the holding out to some person. The person to whom the pretence is held out must therefore be stated."

The content of a false pretence is at least threefold; (a) a false statement of fact; (b) made to another person; and (c) with intent to induce the latter person to rely upon it and to part with something of value.

2 Bish. New C. L., Sec. 415 (3).

Without the averment of the name of the person to whom the false statement was made it does not appear upon the face of the indictment how the $10,000 were or could have been obtained by Daily and his co-defendants by means of that false statement. And unless the false statement was made to some person, or officer, or body of officers, representing the State of Michigan, it is impossible that the peo-

ple of that state could have parted with the $10,000 because of their reliance upon it.

b. Because there is no averment of the person, if any, to whom the defendants "did falsely pretend," it appears upon the face of every count of the indictment that the averment that the defendants obtained the $10,000 by means of false pretences is an averment of "the pleader's conclusions."

Enders v. *The People*, 20 Mich., 233, 240.

c. Moreover, the matter, which it is stated in each count of the indictment, the defendants "did falsely pretend" is not a fact or an existing condition, and, therefore, cannot constitute a false pretence.

It is averred in every count of the indictment under consideration, in substance, that the defendants "did falsely pretend" that the machinery was new and unused and complied with the terms of the contract, whereas the truth is that it was not new, but was worn, used and second-hand and did not comply with said terms. Clearly, the representation that the machinery complied with the terms of the contract is the representation of a conclusion of law, and not of a fact.

And whether a thing is new and had not been used before is largely a matter of opinion, especially in a sale wherein the vendee sees the thing and examines it, and is as capable of determining the truth of the representation as the vendor, and does not pay his money for it until he has seen and examined it.

Such was the situation in the case at bar. The

money was not to be paid except for machinery delivered at the prison, where it could be examined by the Board of Control and all its representatives. And the contract, which is set out *verbatim* in the fourth count of the indictment for bribery, provides that the fourth "25%" of the contract price shall not be paid until after the machines had been installed in the prison and operating and tested by Wrentmore, the consulting engineer of the Board of Control—the vendee's expert.

It has been held that representations, even if relied upon, that certain patents were "new, useful and had not been in use before," are necessarily based, to a large extent, upon mere opinion, and when made by the vendor to the vendee, the vendee being just as able to determine the real fact as the vendor, are not such a fraud as constitutes an actionable injury, *even in a court of equity.* This case seems to be directly in point.

Dillman v. *Nadlehoffer,* 119 Ill., 567, 574, 576.

In the application of said rule in the case at bar the "vendee" is, because of the fourth and sixth provisions of the contract, to all intents and purposes, Wrentmore, the consulting engineer of the Board of Control, and a recognized expert.

The foregoing doctrine is applicable to criminal cases.

Com. v. *Norton,* 11 Allen (Mass.), 266, 267, 268.

Com. v. *Drew,* 19 Pick., 179, 184, 185.

When is an article "new" in trade? No article is sold the moment it is finished. When does it cease to be "new"? How much may it be shop-worn, for example, before it ceases to be "new"? How much must it be soiled, or dust-covered, or weather-stained to render it not "new"? That depends upon the nature of the article, somewhat, and the purpose to which it to be applied. Is an automobile of the 1911 pattern new or not, because it was built in the fall of 1910 and not in the early spring of 1911, and, therefore, will be repainted before it is offered to a customer? Is it new or not, because its machinery and running gear were tried out 45 days instead of 25 days? The contract called for *new* machinery, it is urged. So be it. Then it did not call for *unused* machinery. But new means unused. Does it? Then manufacturers must cease to use machinery in order to test it thoroughly before delivering it to a customer; otherwise they will be selling second-hand machinery. But the indictment does not mean *that kind* of using. Then what kind does it mean? Why was not the kind *meant specified?* And be it remembered that all and every kind of using of machinery *wears* it and renders it, in some degree, *worn* machinery. And it is the better for being partly worn. Every engine, built for a warship, which requires the most durable and efficient engine that it is possible to build, is set up on shore and tried and tested for weeks before it is put in place on the ship and there it is tested and run for weeks again before it is accepted. The same is true in substance of all machinery, sold and de-

livered and "*guaranteed*" by any responsible house. Where will the test for criminal conduct laid down in the indictment under consideration lead us?

d. Every count of the indictment under consideration lacks the averment of another essential element, namely, that the $10,000 were transferred, delivered and paid to the defendants, or to a party represented by the defendants, *for* the machinery furnished and installed in the State prison. This element must expressly appear upon the face of the indictment. Without such element, it does not appear that there was any natural or necessary connection between the false pretences and the obtaining of the $10,000. Without such element *the materiality of the false pretences* does not appear. Without such element the indictment charges no offense. *This is the rule in Michigan.* The facts averred must lead necessarily to the conclusion that the crime was committed. The pleader's conclusion is insufficient.

The rule in Michigan and Illinois, and in every other state following the Massachusetts rule (but not in England or in the states following the English rule) is that in a case for obtaining money or property by a sale or an exchange, effected by means of false pretences, the indictment must contain, *inter alia*, the following express averments:

First. An averment of all the essential elements or ingredients of such sale or exchange.

Second. An express averment that the false pretences were made with a view of, or for the purpose of, effecting such sale or exchange.

Third. An express averment that such sale or ex-

change was, in fact, effected by reason of the prosecutor's belief in and of his reliance upon the false pretences.

Enders v. *The People*, 20 Mich., 233, 240, is the leading Michigan case in support of this proposition, in which case it was held, *on motion in arrest*, that an indictment for obtaining money by falsely representing a farm, sold to the prosecutor by the defendant, was insufficient, *as not charging an offense*, because, although it contained all the other essential averments, it lacked an averment that the farm was conveyed to the prosecutor by the defendant as a consideration for the money paid to the defendant by the prosecutor for the farm; that in the absence of such averment no sufficient connection was made out between the false pretences and the parting by the prosecutor with his property; that such facts must be averred as will lead to a necessary legal conclusion of guilt; that if the facts alleged do not of themselves require this inference no allegation of guilt can help them out; that the result must follow from the facts, and not from the pleader's conclusions; that the defendant's mere representations that his land was good or bad could not have any tendency alone to induce a stranger to give him money; that if he made such representations in order to induce someone to purchase the land and did so induce him and obtained the money and mortgage as a price which would not have been given without those statements, *the materiality of those statements would be thus made to appear;* and that, until it appeared that a sale was thus brought about, the statements of the defendant concerning his farm

did not appear of any more importance than if he had been talking about the weather; that the facts alleged lead to no conclusions, and that an allegation of their importance amounts to nothing.

In the same case, *Enders* v. *The People, supra,* it was held that the indictment was not good by virtue of the Michigan statute, *declaring an indictment sufficient after verdict,* which is in the language of the statute, for the reason that such statute does not dispense with such substantial averments as were required at the common law. The indictment in that *Enders* case was held insufficient on motion in arrest. And in Michigan a motion in arrest for insufficiency of an indictment will be sustained only where the indictment charges no offense, or for want of jurisdiction in the court.

An indictment for obtaining money by falsely representing a watch, sold to the prosecutor by the defendant, was held bad in Massachusetts, on motion in arrest, as not charging an offense because, although it contained all the other requisites of such an indictment, it lacked an averment that the watch was delivered to the prosecutor by the defendant as a consideration for the money paid to the defendant by the prosecutor. The reasoning is the same as in *Enders* v. *The People, supra.*

Com. v. *Strain,* 10 Met., 521, 522.

The same rule is held in the following cases, which illustrate the same defect in indictments for obtaining money or property by false pretences in bargains and sales and exchanges of property, and similar transactions:

Simmons v. *The People*, 187 Ill., 327, 330, 331.
Com. v. *Goddard*, 4 Allen (Mass.), 312.
Com. v. *Lannan*, 1 Allen (Mass.), 590.
Com. v. *Dunleay*, 153 Mass., 330.
State v. *Philbrick*, 31 Me., 401.
Johnson v. *State*, 11 Ind., 481.
State v. *Orvis*, 13 Ind., 564.
Jones v. *State*, 50 Ind., 473.
Cooke v. *State*, 83 Ind., 402.
Johnson v. *State*, 75 Ind., 553.
Funk v. *State*, 149 Ind., 338, 340.
State v. *Saunders*, 63 Mo., 482, 483.
State v. *Bonnell*, 46 Mo., 395.
State v. *Hubbard*, 170 Mo., 346.
State v. *Phelan*, 159 Mo., 122.
State v. *Kelly*, 170 Mo., 151.
White v. *The State*, 3 Tex. Ct. App., 605, 611.
Lutton v. *The State*, 14 Tex. Ct. App., 518, 523.

This defect appears in the third count of the indictment under consideration, as well as in the first two counts, although it seems the pleader sought so to word the third count that said defect would not appear therein.

There is no necessary connection shown on the face of the third count between "said machinery" (second-hand as well as new machinery being previously mentioned) "then and there paid for as new machinery," and the "used, second-hand and worn machinery," previously mentioned.

Nor is there any necessary connection between

the money (if money it was, there being no such allegation) "paid for" "said machinery" and the "ten thousand dollars" obtained and received by Daily, Armstrong and Eminger. (In an indictment under the false pretence statutes the thing obtained must be specified.)

It is not averred, in the third nor any other count, that the "ten thousand dollars" was obtained and received by Daily, Armstrong and Eminger *for* any machinery, new or second-hand, or in payment of the bills rendered for the alleged second-hand machinery.

Moreover, it appears upon the face of the third count that "said used second-hand and worn machinery" was "*theretofore* delivered and installed in said twine and cordage plant of said state." "Theretofore" means before "the first day of May, 1907," the only date previously specified. From this it appears that the used, second-hand and worn machinery was delivered and installed before the contract was entered into between the Board of Control and the Hoover & Gamble Company. The contract, it is averred in this third count, was entered into "thereafter," that is, after the first day of May, 1907.

Nor does it appear from the averments of the third count that the machinery delivered and installed in the twine and cordage plant was so delivered and installed by the Hoover & Gamble Company. They may have assigned that contract to some other manufacturer who delivered and installed the second-hand and worn machinery without the knowledge of the Hoover & Gamble Company.

Again, it is alleged in the third count that Armstrong, Daily and Eminger "did render bills" for the second-hand machinery and it does not appear that any one of them had the authority so to do. Why should the people of the State of Michigan pay to Armstrong, Daily or Eminger bills rendered by them,—bills, presumably from the averments, in their names.

It is also averred in the third count that "said machinery" was paid for but not that the bills, rendered by Armstrong, Daily and Eminger, were paid, nor is it averred in said count either that the bills were paid or that "said machinery" was "paid for" by the people of the State of Michigan or with their moneys, or to the defendants or the Hoover & Gamble Company.

So that, construing the third count as a whole, it appears that certain machinery was paid for, but by whom, or to whom, or with whose money, does not appear, and that, at the same time and place said machinery was paid for, the pleader concludes that $10,000 in money were obtained and received from the people of the State of Michigan by the "fraudulent pretences so as aforesaid set up." The connection between that conclusion and the previous averments is not substantially shown.

e. There is wanting in every count of the indictment under consideration the element that the $10,000 were obtained by any person having authority to represent the Hoover & Gamble Company in demanding and collecting the $10,000. The offence sought to be charged is not one flowing *from the false assumption of such authority.*

It is shown in the second and third counts of the indictment for obtaining the $10,000 by false pretences that Daily was the agent and Eminger the secretary of the Hoover & Gamble Company to represent that company in *making* the contract with the Board of Control, but not that either Daily or Eminger or Armstrong was authorized to demand and collect for that company any of the moneys claimed to be due it from the State of Michigan on account of the furnishing and installation of the machinery in the State prison. Therefore, any representations, true or false, made by Daily, Eminger or Armstrong, or either of them, were, of themselves, futile and vain for the purpose of effecting the collection of the $10,000. Such representations did not bind the Hoover & Gamble Company, and the Board of Control had no authority to rely on them. On this point the following cases seem to be pertinent:

In re Schurman, 40 Kan., 533.

The People v. *Behee*, 90 Mich., 356.

f. Every count of the indictment under consideration lacks an allegation of the element of the ownership of the $10,000 by the people of the State of Michigan. In the language of the Supreme Court of Michigan in *The People* v. *Arnold*, 46 Mich., 271, 273, it is consistent with all the averments in the indictment that the $10,000 were the property of the defendants. Under all the authorities, including that decision of the Supreme Court of Michigan, it is essential in an indictment for obtaining money by false pretences to charge the name of the owner of the property obtained.

This want of the element of ownership is a substantial, not a formal, defect, and is not cured by a verdict of guilty even under statutes which render it unnecessary to charge the name of the person to be defrauded. Moreover, statutes like the English statute, 14 & 15 Vict., c. 100, which authorize the court to cause an indictment to be amended, are limited by force of the common law as well as of the constitutions of the several States of the United States to amendments of *variances* in the particulars of formal defects or immaterial matters. The omission of an averment is not a variance. The Michigan statute on amendments of indictments, cited by counsel for the appellant, is so limited expressly by its terms.

2 Bish. New Crim. Proc., Sec. 173 (2).
People v. *Arnold*, 46 Mich., 271, 273.
Richard Sill v. *Queen*, 1 Dearsly's Crown Cases, 132, 138-149.
Reg. v. *Martin*, 8 A. & E., 481.
Reg. v. *Martin*, 8 C. & P., 196.
Reg. v. *Parker*, 3 A. & E., 292.
State v. *Lathrop*, 15 Vt., 279.
Mays v. *State*, 28 Tex. App., 484.
State v. *Myers*, 82 Mo., 558.
1 Bish. New Crim. Proc., Secs. 96-98, 108-111.

g. Each and every defect in each count of the indictment under consideration, above pointed out, is a substantial, and not a formal, defect, and cannot be cured, by the insertion of averments of matters omitted, by virtue of the Michigan statute, cited at page 8 in the brief of counsel for appellant, which

provides that an indictment may be amended "in case of *variance* between *the statement* in the indictment" of the *name* or *description* of any place or thing "and in all cases whenever the *variance* between the facts alleged in the indictment and those proved by the evidence are not material to the merits of the case." Under the said Michigan statute on amendments of indictments, it is not allowable to amend by charging an offense, not included in the indictment.

Turner v. *Muskegon Circuit Judge,* 88 Mich., 359.

Tiffany's Crim. Law (of Michigan), 4th Ed., 386.

Nor can any of said defects be cured by the Michigan statute which provides that an indictment in the language of a statute is sufficient after verdict. It is expressly so held in *Enders* v. *The People, supra,* 20 Mich., 233, 240, which reviews the English decisions, interpreting and applying a similar English statute in several cases, and also in *The People* v. *Olmstead,* 30 Mich., 431, 437.

The defects, above specified, in the indictment under consideration, render that indictment void as charging no offense. A void indictment, or even a void information, is not amendable in Michigan or any other jurisdiction.

People v. *Gage,* 26 Mich., 30.

Byrnes v. *The People,* 37 Mich., 515.

Turner v. *Muskegon Circuit Judge,* 88 Mich., 359.

People v. *Vogt,* 156 Mich., 594.

People v. *Zlotincke*, 152 Ill. App., 363, 367, 371.

Commonwealth v. *Williamson*, 4 Grattan, 554.

State of Nebraska v. *Denison*, 60 Nebr., 157.

State v. *Cavanaugh*, 52 La. Ann., 1251.

Commonwealth v. *Rodes*, 1 Dana (Ky.), 595.

An indictment is void which entirely omits the averment of an essential fact.

Com. v. *Harrington*, 130 Mass., 35.

1 Bish. New Crim. Proc., Secs. 98a, 325, 326, 331, 508, 509, 513, 519.

h. But even if the indictment under consideration contained averments of all the matters which it is claimed it does not contain; still, even in that view of the case, it does not substantially charge any crime against the laws of the State of Michigan. This appears, it is respectively submitted, from the following considerations:

1. The false statement set forth in the indictment, read in connection with the negation of it (and it must be so read in order to deduce from all the averments what the real truth was) is consistent with the implication and inference that all the terms of the contract had been substantially complied with by the Hoover & Gamble Company. Hence, even if the $10,000 were obtained by the defendants in part payment of the contract price (which is nowhere alleged), there was no fraud accomplished or intended by Daily and his co-defendants.

The statement alleged to be false is, in substance,

that the machinery was new and unused and complied with the requirements of the contract, whereas it was not new, but was worn, used and second-hand, and did not comply with the terms of the contract.

The negation is literal. How much worn the machinery was, or how much used, or *how* used, or to what extent second-hand, or in what respect it did not comply with the terms of the contract, is not averred. So the real truth may be, judging from the averments of the indictment, that the machinery had been used but for one minute before it was installed in the State prison and that the use to which it had been previously put was in testing it and had not impaired but on the other hand, had improved it. In one count it is averred that the machinery was old, but not how old. It may have been one day old. It is everyday parlance, that a child is one day old. It thus appears that the differences, if any, between the machines furnished and installed and the machines contracted for, was not substantial, and that the contract was in all its terms substantially complied with. Herein was no fraud, and under the decisions of the courts in Michigan as well as of other states of the United States and, also, of the United States, the full contract price could be recovered by the Hoover & Gamble Company in an action at law. The kind and make of machinery contracted for was delivered, accepted and operated by the Board of Control in the prison at Jackson.

American Hoist & Derrick Co. v. *Johnson*, 114 Mich., 172.

Menche v. *Falk*, 61 Wis., 623.

Lyon v. *Bertram et al.*, 20 How. (U. S.), 149, 153.

2. It is not to be overlooked that the words "did falsely pretend" state a conclusion of law and not a fact, and that the quantum of truth and falsehood in what was pretended is to be determined from what is averred and the negation thereof.

Rex v. *Perrott*, 2 M. & S., 379, 392.
Du Brul v. *State*, 80 Ohio St., 52.

3. Tested, therefore, by the recognized rule, it clearly appears that the averment of what was falsely pretended, when read in connection with the negation thereof, in every count of the indictment, is a solemn admission of record that the alleged false pretence was substantially true and that the State of Michigan was not defrauded and that the defendants did not intend to defraud it.

People v. *Behee*, 90 Mich., 356.
Ex parte Wall, 107 U. S., 265, 275.
State v. *Jones*, 70 N. C., 75.
State v. *Lambeth*, 80 N. C., 393.
Redmond v. *State*, 35 Ohio State, 81, 83.
State v. *Trisler*, 49 Ohio State, 583.
Keller v. *State*, 51 Ind., 111, 114, 116.
State v. *Webb*, 26 Iowa, 262.
People v. *Miller*, 2 Parker's Crim. Rep., 197.
Barber v. *The People*, 17 Hun, 336.
Reg. v. *Wickham*, 10 A. & E., 34.

i. It appears from the fourth and sixth provisions of the contract, described generally in the indictment for obtaining the $10,000 by false pre-

tences, but set forth *verbatim* in the fourth count of the indictment for bribery, that the Board of Control intended not to rely, and did not rely, upon any statement that might be or was made by any person that the machinery was new, but on the other hand, intended to and did rely solely and exclusively upon a certain "guarantee," specified in said fourth provision, and upon the judgment and approval of C. G. Wrentmore, consulting engineer of the Board of Control, as to whether said "guarantee" had been fulfilled, the judgment of Wrentmore to be founded upon what he ascertained concerning said machinery, not from the defendants or the Hoover & Gamble Company, but from an examination of the machinery itself, by Wrentmore himself, after "the machinery is all installed and tested and operating so as to fulfill the guarantee above given, to the satisfaction and approval of C. G. Wrentmore, Const. Engr., of the Board of Control" (sixth provision). (Trans. Rec., 78.)

The "guarantee" above mentioned is thus stated in said fourth provision:

> "That said party of the second part guarantees the machinery above mentioned to be a complete plant for the manufacture of binder twine and capable of producing 9600 lbs. of mercantile binder twine in a working day of eight hours with a sufficient force of operatives; and also that all the machinery above mentioned shall be constructed in a thorough manner *free from any defects of materials or workmanship* and finished in a first-class manner, also that it shall be of the latest approved patterns."

Read in the light of the foregoing provisions of the contract, no crime is substantially charged in the indictment under consideration.

Where the parties to a contract provide in the contract that its faithful performance shall be determined by a third person, named therein, both parties are bound by the determination of that third person in the absence of fraud operating upon that person or by him.

McAvoy v. *Long*, 13 Ill., 147.
Fowler v. *Deakman*, 84 Ill., 130.
Telluride Power Trans. Co. et al. v. *Crane Co.*, 208 Ill., 218.
Herrick v. *Vermont Cent. R. R. Co.*, 27 Vt., 673.

Besides, Wrentmore was an engineer, a recognized expert. He could determine as well as the Hoover & Gamble Company, or any of its representatives, whether the machines furnished, installed and operating, were new or were worn and had been used. And Wrentmore's experience taught him that use does not necessarily impair machinery.

Again, there is no averment in the indictment that any of the guaranties specified in the contract was not completely fulfilled, except, possibly, as to the machinery being "new," assuming that the contract either provides or guarantees that the machinery shall be new. Does the contract so guarantee or provide? It is not so expressly stipulated in the contract, but the letter containing the bid, dated July 19, 1907, is, by reference thereto, incorporated into the contract. That letter reads:

"Complying with your *request* to quote on 120 spindle twine system, all new machinery to be manufactured by the Hoover & Gamble Company, I herewith submit as per their prices to me the following:"

Thereupon follows a statement of the prices for divers machines.

What the "request" was does not appear. And the interpretation of the letter seems to depend upon that. If the request was to bid for a contract to install machinery, all of which to be new, the contract provides for the installation of machinery all of which is to be new. But if that "request" was to bid for a contract to install machinery, only some of which was to be new and manufactured by the Hoover & Gamble Company, then the contract does not provide for machinery all of which was to be new, the clause "all new machinery to be manufactured by the Hoover & Gamble Company" being fairly susceptible of that interpretation. Besides, that the machinery should be new is not a part of the "guarantee," stated in the contract. On the other hand, that the machinery should be new seems to be industriously omitted from the "guarantee" in the contract.

A contract to deliver property of a certain description followed by the delivery of property not of that description, and by the collection of payment therefor as if it were of that description, does not constitute the offense of obtaining money by false pretences.

1 McClain C. L., Sec. 676.

Com. v. *Haughey*, 3 Met. (Ky.), 223.

The foregoing suggestion is based upon the indictment. The testimony of Daily & Armstrong at the hearing of the writ of *habeas corpus* in the District Court established that the oral understanding between the parties was that all the machinery was to be new.

j. Besides, it is manifest from the terms of the contract that the Board of Control relied upon the guaranties therein, as well as upon the judgment of Wrentmore, and not upon any representations of the makers. This fact, of itself, takes the case out of the statutes for obtaining money by false pretences.

State v. *Chun*, 19 Mo., 233.
State v. *Butler*, 47 Minn., 483.
Fay v. *Com.*, 28 Grattan, 912.
Rex v. *Codrington*, 1 C. & P., 661.

It is true, as stated on page 10 of the brief for appellant, that the presence of a warranty in a contract does not, as a matter of law, prevent the maker thereof from being guilty of false pretences relative to the character or attributes of the thing sold. *Jackson* v. *The People*, 126 Ill., 139, is cited in support of said proposition by counsel for appellant from 18 N. E. Rep. That proposition is true when the contract is obtained by false representations, and when the vendee relied not upon the warranty, but upon the representations *previously* made by the defendant. In the *Jackson* case, *supra*, the horse had been sold and paid for by Hines before the contract and warranty was made out and delivered. At page 143 of the opinion of the Supreme Court in

Jackson v. *The People, supra,* Mr. Justice Shope, speaking for the entire court, says:

> "It appears from the uncontradicted evidence of Hines, that the representations alleged, and which were permitted to be proved, were made, and the sale completed, including the payment of the money by Hines, and the receipt of it by the defendant, before the signing and delivery of said instrument. He testifies that after the contract had been completed, including the payment of the money, the defendant produced the instruments before set out, and asked the witness to sign the latter one of them, which he did. It is not shown that any fraud was used to induce the execution of said instrument by Hines; but it is evident that while Hines signed the paper prepared and produced by defendant, he was induced to make the contract of purchase relying upon the representations previously made by the defendant. He had told the defendant that he knew nothing about horses, and must rely upon his (defendant's) word as to the character and value of the horse."

k. The contract is an executory contract, and therefore every statement in the bid on the part of Daily and in the contract on the part of the Hoover & Gamble Company, was a promise to do something in the future, which is not a representation of a past or present fact or condition, and hence is not a false pretence.

State v. *Crowley and others,* 41 Wis., 271, 281.

l. All the foregoing matter being fairly considered, it clearly appears that the indictment under consideration does not show the accomplishment of, or the intention to accomplish, a fraud and, there-

fore, does not charge the commission of an offense. It is the rule in Michigan and elsewhere that an indictment for obtaining property by false pretences must show an accomplished fraud.

The People v. *Wakely*, 62 Mich., 297, 302.
The People v. *Behee*, 90 Mich., 360.
1 McClain C. L., Sec. 680.
The State v. *Matthews*, 44 Kan., 596, 602.
The State v. *Clark*, 46 Kan., 65.

Where there is no actual intent to defraud, the crime of obtaining money by false pretences is not committed, although the money was obtained by false pretences. The mere obtaining of money by false pretences is, without more, an indifferent act. Such act is not criminal unless it is accompanied by the actual intent to defraud.

The People v. *Getchell*, 6 Mich., 496, 504.

The matters set forth in the indictments are consistent with the supposition that the machinery delivered at the prison plant in performance of the contract was superior to the machinery which, it is complained in the indictments, was not delivered, in respect to durability, efficiency, utility, finish and appearance; that is, in respect to everything except absolute newness, which the experience of mankind has taught is not desirable in machinery.

Read in the light of the entire record it is respectfully submitted that the indictment against Daily for obtaining the $10,000 from the people of the State of Michigan was intended merely as a make-weight in procuring his extradition,—as a pretence to remove Daily to Michigan in order to try him

under the indictment for bribery, it being impossible, under the law, to effect his extradition for the offense, charged in the latter indictment.

m. At page 10 of the brief for appellant it is said:

> "The indictment contains several counts, in one or more of which the nature of the pretences used is not averred, nor is such allegation necessary under the laws of the State of Michigan. (*People* v. *Winslow*, 39 Mich., 505; *People* v. *Dyer*, 79 Mich., 480; *People* v. *Butler*, 111 Mich., 483.)"

It is submitted in reply that the nature of the pretences is averred in every one of the three counts of the indictment, and that it is necessary under the laws of the State of Michigan, as well as under the laws of every state in the United States and of England, to set forth specifically in an indictment for obtaining property by false pretences the nature of the pretences used.

People v. *Winslow*, *supra*, was an indictment for *conspiracy* to obtain money by false pretences, in which indictment, as an overt act in pursuance of the conspiracy, it was averred the fraud was accomplished. The specific false pretences were not set forth in that part of the indictment which charges the conspiracy, nor in that part of the indictment which charges the overt act. But conspiracy in Michigan is complete without the doing of an overt act in pursuance of it. Therefore, so much of said indictment as charged the overt act was surplusage. In the opinion in the *Winslow* case it is said by Mr. Justice Cooley:

> "It is not necessary in a case of this sort to set forth in the information the false pretences by which the offense was accomplished. (*People* v. *Clark*, 10 Mich., 310.)"

Evidently what the great justice meant by said sentence was that it was not necessary to specify the false pretences in an information for a conspiracy to obtain money by false pretences.

At common law a conspiracy was complete without the doing of an overt act in pursuance thereof. Yet it was common in an indictment therefor to allege such overt act and to disregard it on the trial.

People v. *Clark*, 10 Mich., *supra*, cited by Mr. Justice Cooley in support of his conclusion, was an information for *conspiracy* to obtain property by false pretences. The report of the *Winslow* case states simply that the respondent was found guilty without specifying whether he was found guilty of the conspiracy or the overt act.

People v. *Dyer*, *supra*, was an information for a conspiracy to falsely accuse a person of arson and of larceny.

People v. *Butler*, *supra*, was an information for *conspiracy* to obtain money by false pretences. It therefore clearly appears that the said *Winslow*, *Dyer* and *Butler* cases are not in point as regards an indictment for the substantive offense of obtaining property by false pretences.

Counsel for appellee has personally examined every case for obtaining property by false pretences reported in the decisions of the Supreme Court of Michigan, and in every one of said cases it appears that the indictment or information did set forth, or

profess to set forth, specifically the nature of the pretences used. Some of the cases examined by counsel for appellee are the following: *Enders* v. *The People*, 20 Mich., 233; *The People* v. *Wakely*, 62 Mich., 297; *The People* v. *Reynolds*, 71 Mich., 343; *The People* v. *Behee*, 90 Mich., 356; *The People* v. *Fitzgerald*, 92 Mich., 328; *The People* v. *Stockwell*, 135 Mich., 341. Moreover, at page 833 of Tiffany's Criminal Law, Howell's 4th Ed., the precedent of an information for false pretences under the statutes of Michigan is there set forth, which precedent shows that the false pretences must be specified. Tiffany's Criminal Law, above cited, is a treatise on the criminal law of the State of Michigan, with precedents of indictments and informations, etc.

Furthermore, the rules held in Michigan cases for obtaining property by false pretences are inconsistent with the supposition that it is not necessary in an indictment or information for that offense in Michigan to set forth specifically the nature of the pretences used.

In *The People* v. *Wakely*, *supra*, it is held that the pretences must be proved substantially as alleged. In *The People* v. *Behee* and *The People* v. *Reynolds*, *supra*, it is held that the false representation must be averred to be false *in fact*, and that without such showing no offense is charged in the indictment. And in the opinion in *Enders* v. *People*, *supra*, at page 240, it is said:

> "Enders moved in arrest of judgment, after conviction, upon the insufficiency of the information. The objections are principally upon the ground that there is no sufficient connection

made out by allegations of *material facts*, between the pretences and the parting by Brandt with his property, and that *the materiality* of the pretences does not sufficiently appear.

"It is not disputed that the information does not conform at all to any proper standard of pleading. All systems of criminal, as well as of civil pleading, require that *such facts* be averred, as will, if admitted, lead to a necessary legal conclusion of liability or guilt. And if *the facts* so alleged would not of themselves require this inference, no allegation of guilt could help them out. The result must follow from *the facts*, and not from the pleader's conclusions."

From the foregoing extract from the opinion in the *Enders* case it appears that not only must the material facts which make up the false pretences be averred, but there must also be an averment showing a necessary connection between those material facts and the parting of the property by the prosecuting witness.

Again, the holding in the *Enders* case that the Michigan statute, providing that an indictment in the language of the statute is sufficient after verdict, does not dispense with such substantial averments as are required at common law, in effect decides that the false pretences must be specified in an indictment for obtaining property by false pretences, for that was the rule at common law. As, also, at common law it was not necessary to specify the false pretences in an indictment for conspiracy to obtain property by false pretences.

The text-writers all state that the false pretences must be specified in an indictment or information

for obtaining property by false pretences. 2 Bish. New Crim. Proc., Sec. 165; Whart. Cr. Pl. & Pr., 9th Ed., Sec. 221; Whart., Vol. 1, Prec. of Ind. and Pleas, p. 505; 1 McClain, C. L., Sec. 699.

A statute providing that the false pretences need not be specified is unconstitutional: *State* v. *Terry,* 109 Mo., 601; *State* v. *Benson,* 110 Mo., 18; *State* v. *Cameron,* 117 Mo., 371; *State* v. *Kain,* 118 Mo., 5. Constitutionality of Maryland statute, which so provides, is saved by provision that accused is *entitled,* upon demand, to a statement of particulars of the pretences and of the names of the witnesses. *State* v. *Blizzard,* 70 Md., 385.

F.

THE NATURE AND CHARACTER OF THE ACT WHICH MAY BECOME THE JURIDICAL CAUSE OF OBTAINING MONEY BY FALSE PRETENCES OR GIVING A SUM OF MONEY AS A BRIBE. APPLICATION OF CONTENTION TO THE INDICTMENT.

1. If the indictment for obtaining the $10,000 by false pretences does not charge a crime, as contended on behalf of Daily, it is immaterial, so far as said indictment is concerned, whether what Daily did in Michigan on July 22, 1907, in November, 1907, and on April 7, 1908, was the juridical cause of any crime. But it is earnestly contended by counsel for Strassheim that said indictment does charge the crime of obtaining money by false pretences, and it is conceded on behalf of Daily that the other indictment does charge Daily with the crime of *giving* to Armstrong $1,500 as a bribe. Hence, it remains to determine the nature and character of the act which may become the juridical cause of the crime

of obtaining money by false pretences, or of the crime of *giving* a sum of money as a bribe.

2. "A juridical cause" (of the crime charged) "is such an act, by a moral agent, as will apparently result, in the usual course of natural events, unless interrupted by circumstances independent of the actor, in the consequence" (the crime charged) "under investigation."

1 Whart. C. L. (10th ed.), Secs. 178, 154.

Such a juridical cause is clearly distinguishable from, and in the application of the law should be carefully distinguished from, all pre-existing conditions and all preliminary preparations for the commission of such crime, without all of which conditions and preparations the act which became the juridical cause would and could not have resulted in the crime. And such distinction should be carefully made for the reason that, although such pre-existing conditions and preparations do not enter into and become part of the juridical cause, yet they are, all and each, potentially present at the time and place when and where the juridical cause is set in motion.

3. The foregoing definition of a juridical cause by Wharton is exactly the definition of the overt act in a common law attempt to commit a crime. That is, the act which constitutes the juridical cause of a crime amounts to a common law attempt to commit the crime, if such act fails to produce the crime intended, because it was interrupted by circumstances independent of the actor.

1 Wharton Cl. L. (10th Ed.), Sec. 173, 179.

1 Bish, New Crim. L., Sec. 728.

The Michigan statute on criminal attempts is as follows:

> "Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, *when no express provision is made by law for the punishment of such attempt,* shall be punished as follows:
>
> * * * * * * * *
>
> "3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term *less than five years,* or by imprisonment *in the county jail, or by fine,* the offender convicted of such attempt shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding three hundred dollars; but in no case shall the punishment by imprisonment exceed one-half of the greatest punishment which might have been inflicted if the offense so attempted had been committed."
>
> Vol. 3, Comp. L. Mich., 1897, Sec. 11784.

It is held in the Michigan cases that said Michigan statute defining an attempt was intended only to provide a punishment for what was already an attempt to commit a crime at common law.

People v. *Youngs,* 122 Mich., 392.
McDade v. *People,* 29 Mich., 50.
Harris v. *People,* 44 Mich., 305.
Brooks v. *Cook,* 102 Mich., 78.

The maxim *de minimis lex non curat* is peculiarly applicable to the crime of attempt.

1 Bish. New C. L., Secs. 726, 737, 739, 759, 762.

The offense of giving a bribe, charged in one of the indictments in this case, as well as the offenses of offering and promising a bribe (all three offenses being made punishable by the same Michigan statute), is punishable in the State prison for a term of not more than five years or by fine and imprisonment in the county jail.

Compiled Laws of Michigan, Sec. 11311.

Said Michigan statute will be found at page 8 of the brief for appellant.

4. The act which constitutes the juridical cause of a crime is an act which, "*of itself,*" will apparently produce the resultant crime. This proposition is derived from Wharton's definition of the overt act in a common law attempt, to be found in the second paragraph, Sec. 180, 1 Whar. Cl. (10th Ed.). Those words, "*of itself,*" are necessarily implied in every definition of a common law attempt to commit a crime, and therefore in the definition of the juridical cause of a crime. No act can be a *cause* which cannot, of itself, produce the result.

Hence, the only juridical cause of the obtaining of the $10,000 by false pretences, or of the *giving* of the $1,500 as a bribe, is such an act as, *of itself*, would apparently, or did actually, *of itself*, result in the obtaining of the $10,000 by false pretences or in the *giving* of the $1,500 as a bribe.

The foregoing views are supported by the decisions of two courts, wherein the question under consideration has been decided, with this apparent qualification, that the act of a person, while corporeally within the demanding state, in procuring another to commit a crime, who subsequently com-

mits it, was deemed, *arguendo*, in one of those cases, namely, the *Cook* case, the juridical cause of the resultant crime. This qualification is apparent only, for the procurement of a person to commit a crime is a juridical cause of the crime, committed in pursuance of the procurement.

In re Cook, 49 Fed. Rep., 833, 843, 844.
Re William Sultan, 115 N. C., 57.

5. In dealing with this proposition, in its application to the indictment for bribery, the word "give" should be emphasized, it is submitted, and for this reason,—the indictment for bribery annexed to the requisition charges only that Daily "did give" the $1,500 as a bribe, whereas, the statute of Michigan, upon which it is based, makes it a crime to *give, offer* or *promise* a bribe, and the offer or promise of a bribe is not a minor offense included in the offense of the giving of a bribe.

And this is so, for the reason that the Michigan statute, under which the indictment for bribery in this case is drawn, has elevated to substantive offenses the only two acts which can be deemed to be of the nature of an attempt to bribe, namely, the acts of promising and offering a bribe. But if there is any other act than that of promising or offering a bribe, which would amount to an attempt to bribe, such act is not charged in the indictment for bribery in this case, and, besides, nothing done by Daily, while he was corporeally in Michigan, was such other act.

The foregoing propositions are all embraced in the Michigan statute on criminal attempts, in this,

the Michigan statute on criminal attempts merely provides for the punishment of an attempt to commit an offense prohibited by law, "when no express provision is made by law for the punishment of such attempt." Such "express provision" is, in effect, made in the statute, upon which the indictment for bribery in this case is framed, by the inclusion therein of the acts of offering and promising a bribe.

Moreover, at common law, the offer as also the promise, of a bribe, was charged in indictments and dealt with in all respects, *as substantive offenses*, exactly as they are dealt with in the Michigan statute, under which is drawn the indictment for bribery, annexed to the requisition. To promise or to offer a bribe was not at common law the crime of attempt, strictly speaking. To promise and to offer a bribe, it is true, are analogous to attempts, but they do not constitute such attempts, because neither the act of offering nor the act of promising a bribe was sufficiently proximate to the consummated act of giving the bribe; nor can either the offer or the promise of a bribe, *of itself*, cause the consummated offense, namely, the giving of a bribe. A bribe cannot be given unless it is accepted, and the offer or promise of the bribe will not necessarily, unless interrupted in the natural course of events, induce the acceptance of the bribe. Wharton so states the foregoing proposition in Whart. C. L. (10th Ed.), Sec. 179, beginning at the bottom of page 201. But while the promising and offering of a bribe are not, strictly speaking, attempts to bribe, they are endeavors to bribe, and although not amounting to attempts, they were punishable at the common law as definite and

substantive offenses because of their dangerous nature.

The common law seems to have made every step taken toward the consummation of the crime of bribery an independent, distinct and substantive offense.

1 Russell on Crimes (7th Eng. and 1st Can. Ed.), top of page 145.

1 Bish. New C. L., Secs. 767, 724, 435 (2).

2 Bish. New C. L., Sec. 88.

2 Bish. Dir. and Forms, p. 124.

All the precedents support the foregoing views and precedents rank next below decisions as authorities. The precedents for informations for promising or offering a bribe in 3 Chitty C. L., pages 683-689, 693-696, proceed on the theory that to promise or to offer or to propose to give a bribe is a substantive offense. True, the last precedent on page 696, concludes as for an attempt. But this conclusion like similar conclusions in indictments for perjury and murder are mere conclusions of law and therefore surplusage. On the same theory proceeds the information in *Rex* v. *Plymton*, 2 Ld. Raymond, 1377, for promising money to a member of a corporation in order to induce him to vote for the election of B. as Mayor.

The indictment might, without being duplicitous, have charged that Daily did promise, offer and give the bribe and it would be sustained by proof that he did any one of the three acts.

2 Bish. New Crim. Proc., Secs. 586, 434-436, 484 (2).

But proof that Daily gave the $1,500, will not sustain a charge that he promised or offered the $1,500; nor will proof that Daily promised or offered the $1,500 sustain the charge of giving the $1,500.

Nor under this indictment for giving the bribe can Daily be convicted of an attempt to bribe under the Michigan statute defining a criminal attempt by virtue of the Michigan statute, authorizing a conviction for an attempt under an indictment charging the consummated crime, which statute reads as follows:

> "Upon an indictment for any offense, consisting of different degrees, as prescribed in this title, the jury may find the accused not guilty of the offense in the degree charged in the indictment, and may find such accused person guilty of any degree of such offense, inferior to that charged in the indictment, or of an attempt to commit such offense."
>
> 3 Compiled Laws of Michigan, Sec. 11789.

That Michigan statute last above quoted which authorizes a conviction for an attempt under an indictment charging the consummated crime, must be construed and interpreted, together with the general statute of Michigan, which provides punishment for attempts to commit crime, hereinbefore quoted, and which also provides that it is applicable only to cases "when no express provision is made by law for the punishment of such attempt."

In the statute under which is framed the indictment for bribery in this casee, there is "express provision" made for the punishment of what, although

not strictly an attempt, is deemed to be such, namely, to promise or to offer a bribe. Therefore, said "express provision," as well as the statute, defining bribery, which makes it bribery to promise or offer a bribe, takes the offense of promising and offering a bribe entirely out of the two Michigan statutes, one of which defines and provides for the punishment of an attempt to commit a crime, the other of which authorizes a conviction for an attempt under an indictment charging the consummated offense.

Furthermore, under the indictment for bribery in this case, Daily could not be convicted of promising or offering a bribe, because *the facts* of promising and offering a bribe are not charged in the indictment. In Michigan the rule is strictly enforced that an indictment or information for a statutory offense, must contain averments of *every element enumerated in the statute* as combining to create the offense, or it is *bad.*

Hall v. *The People*, 43 Mich., 419.
The People v. *Chappel*, 27 Mich., 486.
Shannon v. *The People*, 5 Mich., 71.
Koster v. *The People*, 8 Mich., 431.
Chapman v. *The People*, 39 Mich., 357.
Enders v. *The People*, 20 Mich., 233.
The People v. *Olmstead*, 30 Mich., 431.

In *The People* v. *Olmstead, supra,* the information charged that the defendant did "feloniously, wilfully and wickedly kill and slay contrary to the statute in such case made and provided." It was held that the information was good under the Mich-

igan statute. But *the facts* of the case were that the defendant was prosecuted under a statute which provided in substance that every person "who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, etc., shall in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter." The judgment against Olmstead was reversed because, although the information was *per se* sufficient, *yet it did not apprise Olmstead of the facts* which were introduced in evidence against him. The Supreme Court say, in the opinion at page 439:

> "Nothing could inform him of this statutory charge, except allegations conforming to the statute. *This we think he was entitled to have spread out upon the accusation.* Without them he was liable to be surprised at the trial and could not be expected to prepare for it.
>
> "We are not prepared to hold this information bad upon its face, for we are disposed to think, and it was practically admitted on the argument, *that it may apply to the ordinary homicides by assault.* It was not therefore until the evidence came in that it was made certain the case was different.
>
> * * * * * * * *
>
> "It must be certified to the court below that the verdict should be set aside, and that no further proceedings on this charge should be had under this information as it stands."

In *Chapman* v. *The People*, *supra*, at page 359, the court say:

"As has been frequently remarked, the rules of pleading are formed on the supposition that accused persons may be innocent, and they cannot be construed except in that light. They are assumed as necessarily containing, according to the constitutional requisition, enough to inform an innocent man *of the facts* intended to be shown against him.

* * * * * * * *

"Making all due allowance for the averments which at common law need not be strictly made out, the offense must not at any rate be misdescribed, nor can the indictment omit anything essential to its description. *Enders* v. *People*, 20 Mich., 233; *Merwin* v. *People*, 26 Mich., 298."

The charge of an attempt to commit a crime is not sustained by proof of the commission of the crime, and this is so, because an attempt imports a failure to accomplish the intended result.

Graham v. *The People*, 181 Ill., 477, 488-491.

The charge in the indictment for bribery is, and a conviction can be had under it only, for the giving of the bribe.

If an offense may be committed in either of various modes, the party charged is entitled to have that mode stated in the indictment which is proved at the trial; and when one mode is stated and proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance.

Com. v. *Richardson*, 126 Mass., 34, 39, 40.
Randle v. *State*, 12 Tex. App., 250.
People v. *Fulle*, 12 Abb. N. C., 196.

To *offer* a bribe within the meaning of the statute, upon which the indictment for bribery in this case is framed, means nothing short of presenting the bribe for acceptance or rejection.

In *State* v. *Harker,* 4 Harr. (Del.), 559, it became necessary for the court to discriminate between the words "give," "offer," "promise" and "procure," as used in the bribery laws of Delaware; and it was held, Booth, C. J., speaking for the court:

> "To *give* a reward by way of bribe, is to pass or deliver the reward or bribe immediately to another; to *offer* it, is to present it for acceptance or rejection; to *promise* it, is to make a declaration or engagement that it shall be given; to *procure* it, is to obtain it from others."

State v. *Harker, supra,* is the only case found by counsel for appellee wherein it was necessary for the court to distinguish the words "give," "offer" and "promise" in a bribery statute.

In *O'Brien* v. *State,* 6 Tex. App., 665, it was held that any expression of an ability to produce a bribe, as a gift to an officer to induce him to release a prisoner, is all that is necessary to perfect the crime of offering the bribe, charged in the indictment. But there in that case the statute upon which the indictment was framed did not create the offense of *promising* a bribe. That statute as quoted in the opinion at page 67 reads as follows:

> "If any person shall bribe, or offer to bribe, any sheriff or other peace officer," etc.

In that case it was necessary to distinguish merely between the giving and the offering of a bribe within the meaning of the statute upon which the indict-

ment was framed. It was not necessary to distinguish a promise from an offer of a bribe.

6. Clearly, not one or all of the acts, claimed to have been done by Daily, while he was corporeally in Michigan, amount to and constitute the juridical cause of obtaining (that is, an attempt to obtain) the $10,000 by false pretences, or the juridical cause of the giving to Armstrong of the $1,500 as a bribe. No act short of the making of the false representation, if any, could possibly be the juridical cause of the obtaining of the $10,000 by false pretences.

The talking with the members of the Board of Control at their meeting in Detroit, Michigan, on July 22, 1907, at which time nothing was done by Daily except to receive information that his bid for the Hoover & Gamble Company had been accepted; the conversation with Armstrong in November, 1907, about the word "new" in the contract (assuming that conversation occurred at Jackson, Michigan); what was done at Jackson, Michigan, on November 14, 1907, by Daily in the examination of the sisal warehouse and in deciding to relieve its congested condition by stopping temporarily the shipment to Jackson of machinery and sisal; and the examination of the plant in operation on April 7, 1908, by Daily and Eminger, do not, singly or collectively, constitute the juridical cause of obtaining the $10,000 by false pretences, or the juridical cause of the giving of the $1,500 to Armstrong, or even of promising or offering to Armstrong any money as a bribe.

Making the false representation might naturally of itself result in the obtaining of the $10,000. But Daily, while in Michigan, made no false rep-

resentation, nor, in fact, outside of the indictment, is there any pretence whatever that any person made what is claimed or pretended to be a false representation.

And no possible act other than the actual tender of the $1,500 followed immediately by the acceptance of the same by Armstrong, or the actual procuring, while Daily was corporeally in Michigan, of some other person to tender the $1,500, followed by its acceptance by Armstrong, could possibly constitute the juridical act of the giving of the bribe to Armstrong. And the evidence is conclusive that Daily did not in person at any place give the $1,500 to Armstrong, and there is no evidence nor any claim that Daily, while corporeally in Michigan, procured another person to give Armstrong the $1,500. On the other hand, the only claim on behalf of appellant is that appellee, while in Chicago, Illinois, sent his son into Michigan to give Armstrong the $1,500; and this claim is not supported by a scintilla of evidence. It is supported merely by a statement in the brief for appellant at page 3, volunteered by the opposing counsel, and the offer of Mr. Thomas Barkworth, counsel for appellant at the hearing, to prove by Daily on his cross examination that he knew of his son going to Jackson, Michigan, on May 13, 1908.

The conversation between Daily and Armstrong respecting the word "new" in the contract, irrespective of the place where it occurred, was not the promise or the offer of a bribe, under any definition of those words.

In that conversation as it is related by Armstrong, Daily said that Eminger had objected to the word

"new" in the contract, and was afraid that they, the Hoover & Gamble Company, would have trouble with the consulting engineer in regard to the matter, and Armstrong replied that he did not think that they would have any trouble with him. That conversation, in the light of the rest of Armstrong's testimony, suggests the inference that the Hoover & Gamble Company anticipated trouble about the matter if all the machinery was not new. But it does not tend to show the alleged bribery or the obtaining of the $10,000 by false pretences. And in this connection it is to be remembered that, in response to questions put to him by Judge Landis, Armstrong answered that he never had any talk with Daily in the State of Michigan at all respecting the present of a thousand dollars or anything in the way of any irregularity in connection with the installation of the machinery, unless the foregoing conversation occurred in Michigan. (Trans. Rec., 143, 144.)

It may be worthy of remark in this aspect of the case that the crime of bribery cannot, like murder, larceny or obtaining money by false pretences, be committed by the sole act of the criminal. On the other hand, in this respect the crime of bribery is like incest, adultery, dueling, giving a rebate or concession. The crime of bribery is impossible without the concurrence of the bribe taker and the bribe giver. In this aspect of the case the law is that a mere promise to give, or an offer to give or an effort of any kind to persuade and produce a state of mind consenting to the acceptance of a bribe, is not a common law attempt to commit the crime of, or the juridical cause of, the giving of a bribe.

Whart. C. L. (10th Ed.), Sec. 179.
Cox v. *The People*, 82 Ill., 191.

Therefore, to hold that said talk about the Daily-Eminger conversation concerning the word "new" in the contract was a ratification of the alleged original agreement in Chicago between Daily and Armstrong (and it is contended further along there was no such agreement), and, consequently, a renewal of the promise to give Armstrong a bribe, and that such promise was a juridical cause of the actual giving of the $1,500 would, in fact, be a decision that Daily stands charged in Michigan with the substantive crime of promising to give Armstrong a bribe, which is not charged in either of the indictments annexed to the requisition.

The crime charged in the indictment of giving a bribe may be sustained without any evidence of a promise so to do. For example, A., an official, says to B.: "Give me $1,500 and I will vote for you." B. thereupon hands A. the $1,500.

Nor can the agreement between Daily and Armstrong, the one to give and the other to accept a bribe, be deemed in law a juridical cause of the final giving of the bribe. That agreement, "of itself," could not be the cause of any physical act, as before stated. Of course, Daily and Armstrong might, in fact, carry out that agreement, but the carrying out of that agreement would be another act than the agreement itself, and a juridical cause, as we have seen, is one that will, of itself, result, in the usual course of natural events, if uninterrupted by circumstances independent of the actor, in the commission of the crime intended to be committed.

7. Nor did the agreement between Daily and Armstrong, the one to give and the other to accept, a bribe, constitute a conspiracy to accept, or a conspiracy to give a bribe. An indictment for conspiracy does not lie for an agreement between two persons, the one to give and the other to accept a bribe, for the reason that the crime of bribery itself cannot be committed without such an agreement.

2 Whart. C. L. (10th Ed.), Sec. 1339.

U. S. v. *Dietrich et al.*, 126 Fed. Rep., 664.

U. S. v. *N. Y. Cent. & H. R. R. Co.*, 146 Fed. Rep., 298, 302-304.

8. The testimony given by Armstrong as to the conversation between him and Daily concerning the word "new" in the contract fails to prove that said conversation occurred between Daily and Armstrong, while Daily was at Jackson, Michigan, or at any other place in Michigan on November 14, 1907, or on any other day. The only testimony as to where said conversation occurred, if ever, was given by Armstrong. Armstrong's testimony on that point is that said conversation occurred either in Chicago, Illinois, or in Jackson, Michigan, or over the telephone (meaning over the telephone between Jackson, Michigan, and Chicago, Illinois, Armstrong being in Jackson and Daily in Chicago), but to the best of Armstrong's recollection, in Jackson, Michigan, but that he woldn't be positive, that he didn't remember. That testimony leaves in considerable doubt the place where, if ever, said conversation occurred and does not cast upon Daily, it is submitted, the burden of showing that it did not occur at some place

in Michigan, while Daily was corporeally within the State of Michigan.

Daily was not asked, on his direct or cross examination, whether any conversation about the word "new" in the contract had occurred. There was no evidence in the record of such conversation until Armstrong gave his testimony. But in effect Daily on his cross examination denied that such conversation ever occurred by the following testimony:

> "Mr. Thomas Barkworth: At some time or other, Mr. Daily, Mr. Allan Armstrong knew of the substitution of that machinery, did he not?
>
> "Daily: Not from me.
>
> "Mr. Thomas Barkworth: I asked you whether or not Mr. Allan Armstrong knew of the substitution of the Ayton, Canada, machinery some time or other during the completion of that contract.
>
> "Daily: I don't know that he ever knew it." (Trans. Rec., 140.)

G.

THE DISTINCTION BETWEEN AN ACT, WHICH IS THE JURIDICAL CAUSE OF A CRIME CHARGED, AND AN ACT WHICH IS AN OVERT ACT IN FURTHERANCE OF A CONSPIRACY TO COMMIT SAID CRIME.

1. Said distinction is clearly made by the Supreme Court of Michigan in its opinion in *People* v. *Youngs*, 122 Mich., *supra*. In that case two questions were presented: Whether the Michigan statute providing a penalty for an attempt to commit a crime *changed* the common law rule as to what constitutes such an attempt and whether the facts stated in the indictment showed an attempt as defined at common law. The court answered both of these questions

in the negative and held that an attempt under that Michigan statute was an attempt at the common law, namely, that an act to constitute a criminal attempt must be one immediately and directly tending to the execution of the principal crime and committed by the prisoner under such circumstances that he had the power of carrying his intentions into execution.

In the opinion in *People* v. *Youngs, supra,* the following language of the court in *Reg.* v. *Taylor,* 1 F. & F., 511, 512, which was an indictment for an attempt to set fire to a stack of corn, is quoted with approval:

> "If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature."

It appears, therefore, that an act which is merely preparatory to the execution of a crime is an act which may be an overt act in furtherance of a conspiracy to commit that crime.

But, it is not to be overlooked that no act is such an overt act, unless it has a tendency at any rate to carry out the object of the conspiracy or in some way tends to make it effectual.

U. S. v. *McLaughlin,* 169 Fed. Rep., 302, 307.

U. S. v. *Kissel,* 173 Fed. Rep., 823, 827.

U. S. v. *Black* (C. C. A.), 160 Fed. Rep., 431.

Measured by said rule, it is submitted, that in no possible aspect of the case can Daily's trip to Detroit on July 22, 1907, to ascertain whether the Board of Control accepted his second bid or Daily's trip to Jackson on November 14, 1907, for the purpose of relieving, and his decision to relieve (by stopping temporarily the further shipment to Jackson of machinery and sisal) the congested condition of the sisal warehouse in the prison plant, or Daily's alleged conversation with Armstrong in November, 1907, about the word "new" in the contract (wherever that conversation occurred) or the trip of Daily to Jackson on April 6 and 7, 1908, to observe the working of the machinery installed in said plant, be deemed an overt act in pursuance of any conspiracy to obtain the $10,000 by the supposed false pretences alleged.

2. Counsel for appellant do not discuss, it is submitted, the vital question involved in this case. They assume that question in its two-fold aspect. They state at page 14 of their brief as a fact (whereas the contrary is established by the evidence in the record as is hereinbefore pointed out) that Daily in Detroit on July 22, 1907, tendered the Hoover & Gamble bid to the Board of Control. Thereupon they state their contention in a metaphor in this way: "thus setting in motion the *machinery* by which the result was ultimately to be accomplished."

Reasoning by metaphor is very impressive but always dangerous, generally misleading and commonly involves a conclusion to which there are exceptions. If the counsel for appellant had carefully defined what is such "machinery" as is within the rea-

son of the law and applicable to the case at bar, their metaphor might have been of use to the court and opposing counsel; but without any definition of such "machinery" their contention will be useless to the court and leaves opposing counsel without a clearly conceived proposition to concede or deny or to qualify.

Let us pursue that metaphor a little farther. What does the word "machinery" mean in that metaphor? What is its full legal import? Mr. Justice Jenkins, in his scholarly and learned opinion in the *Cook* case, cited in the brief for each party, answers that question. Mr. Justice Jenkins uses the same metaphor in that opinion, but he accompanies it with such a discussion of the fundamental principles of law applicable to the case, submitted to him for decision, as to make clear that what he meant (and that what is meant in the law) by "machinery," in that metaphor, is "machinery" which, when once set in motion by the criminal, *of itself*, in the way in which the particular machinery usually operates, if not stopped, will produce the crime charged: that is, "machinery" in that metaphor means what has hereinbefore been shown to be an act which is the juridical cause of the crime charged. Could the "machinery," which, counsel for appellant specifies, to-wit, the bid, of itself, if uninterrupted, in the usual course of events, operate to obtain the $10,000 by false pretences, or to give the $1,500 as a bribe?

3. Again, if there were in existence between Daily and Armstrong on July 22, 1907, a conspiracy to accomplish any unlawful purpose and any act, done by Daily on that day at Detroit, were an overt

(if he is charged in either indictment with a crime) upon which exclusively rests his right to be released from the custody of Strassheim, sheriff, under and by virtue of the extradition warrant.

H.

THERE IS NO CHARGE OF CONSPIRACY IN EITHER OF THE INDICTMENTS, ANNEXED TO THE REQUISITION, NOR IS ANY CONSPIRACY TO COMMIT EITHER OF THE CRIMES, CLAIMED TO BE CHARGED IN SAID INDICTMENTS, ESTABLISHED BY THE EVIDENCE.

Conspiracy is a species of the crime of attempt, and as such, the maxim *de minimis lex non curat* is peculiarly applicable thereto.

2 Bish. New C. L., Secs. 191-195.
1 Bish. New C. L., Sec. 739.

1. The allegations in the two indictments, annexed to the requisition, as to conspiracy, are immaterial allegations. At most they are merely evidentiary facts. Such allegations do not in form or substance set forth the elements of a conspiracy and would not sustain a verdict for conspiracy. As regards a charge of conspiracy, those two indictments lack averments of unlawful or criminal means to accomplish a lawful object or of an unlawful or criminal object to be accomplished, and also, of the name of the party to be defrauded and of what said party was to be defrauded and of whose property that party was to be defrauded. All the averments in the two indictments in this respect are mere surplusage and require no answer from Daily.

The material allegations in an indictment are those averments which set forth charges that are

contrary to law and make up the offense, and not those which charge things not contrary to law, however morally wrong they may be and which are not necessary to constitute the offense. A plea of not guilty to these indictments would not put in issue the accusations and complaints, or, rather, the objurgatory verbiage, about conspiracy. *Ex parte Houghton*, 8 Fed. Rep., 897, 901. Moreover, as it has hereinbefore been pointed out, an indictment for conspiracy to accept a bribe or to give a bribe does not lie, because of the alleged agreement between Daily and Armstrong, one to give, the other to accept a bribe.

2. Nor is any understanding, crime or combination, amounting to a criminal conspiracy, shown by the evidence. Excepting the affidavit of Armstrong, annexed to the requisition, there is no evidence in the record at all tending to show that Daily and Armstrong entered into an agreement, whereby Daily was to give Armstrong a sum of money, and Armstrong was to accept that sum of money, upon the understanding between them, that in the performance of the contract, if the contract was awarded to the Hoover & Gamble Company, the Ayton machinery was to be used, and Armstrong was to remain silent respecting said use and to deal with the Ayton machinery just as if it were all entirely new.

And such an agreement, if any such existed, does not amount to a criminal conspiracy, because it was not an agreement to accomplish a lawful object by unlawful or criminal means, or to accomplish an unlawful or criminal object. The word "unlawful" in the definition of conspiracy embraces not every

illegal act, but only such acts, not criminal, as are violative of the rights of individuals and for which the civil law will afford a remedy to the injured party, and will at the same time and by the same process punish the offender for the wrong and outrage done to society by giving exemplary damages beyond the damages actually proved.

Smith et al. v. *The People*, 25 Ill., 9, 14.

Whether such an agreement, if any such existed, between Daily and Armstrong embraced an unlawful act (barring the promise to bribe Armstrong involved in the agreement which must be excluded, as hereinbefore shown), depends altogether upon the durability and efficiency of the Ayton machinery. The description of said machinery in both indictments, namely, that it was machinery which was not new but which had been worn and used and was second-hand, does not show said machinery to be machinery which was less durable and less efficient than new machinery. Therefore, in a civil action on the part of the Board of Control against the Hoover & Gamble Company, the Board of Control would not be entitled to punitive damages because the Ayton machinery had been used, and was not new machinery and was not machinery which had never been used. Nor would the actual representation before any part of the contract price was paid to the Hoover & Gamble Company, to the effect that the machinery was all new, amount to a false representation, as is hereinbefore shown.

It is clear, therefore, that the agreement, if any, between Daily and Armstrong, did not amount to a

conspiracy to obtain money by unlawful means or to accomplish an unlawful object or to commit a crime, to-wit, to obtain money by false pretences.

Moreover, said agreement does not amount to a conspiracy to cheat and defraud the people of the State of Michigan by unlawful means *other than by false pretences,* for the reasons hereinbefore set forth.

To constitute an indictable conspiracy in Michigan there must be a combination of two or more persons to commit some act known as an offense at common law, or that has been declared such by statute, or an act not in itself unlawful by unlawful means. And in Michigan an indictment for conspiracy to accomplish an unlawful object or a lawful object by unlawful means (unlawful being distinguished from criminal) does not set forth every element of an offense, unless the facts averred show either the object or the means to be unlawful. That is, an indictment in Michigan charging that the defendants conspired *to cheat and defraud* a certain person of his property, etc., without showing by specific facts alleged that the means to be used were unlawful, does not charge an offense even on motion in arrest. The words "cheat and defraud" do not necessarily import a criminal or an *unlawful* act, within the meaning of the word "unlawful" in the definition of conspiracy, under the rule held in Michigan, which follows the rule that always obtained in Massachusetts.

Alderman v. *People*, 4 Mich., 414.

act in furtherance of that conspiracy, the operative presumption of the law is, not that Daily continued, but that he ceased, to be a member of that conspiracy. The presumption of continuance being a presumption of law is overcome by the presumption of innocence. *Dalton* v. *U. S.* (C. C. A.), 154 Fed. Rep., 461, 463. Several instances, where it was held that the presumption of innocence overcomes the presumption of continuance, will be found at page 430, Lawson on Pres. Ev.

And this effect of the presumption of innocence is strengthened by the fact that at no time did Daily, in person or by an agent, represent to any person or body of men that the machinery was new for the purpose of collecting payment for the machinery. This fact should be considered, for the theory of the people of the State of Michigan, embodied in the two indictments annexed to the requisition and in the contentions for appellant, is that said alleged conspiracy ripened into the substantive crimes of bribery and obtaining the $10,000 by false pretences. There is always a *locus poenitentiae*. Daily absolved himself from the guilt of any substantive crime committed in pursuance of any conspiracy, of which, it is asserted he was a member, that is from the guilt of anything except the conspiracy itself, which is not charged, provided he withdrew himself from the conspiracy before the act, if any, which was the juridical cause of such substantive crime, was committed by some one or more of the conspirators, no matter how many overt acts in pursuance of the conspiracy had been committed before the committing of such act as was such juridical cause. This

rule of law, which runs through our jurisprudence, is followed by the courts and has been followed by the Supreme Court of Michigan. If the criminal purpose is abandoned before enough is done to constitute an attempt, guilt is not incurred. Until at lease an attempt has been committed there is *locus poenitentiae.*

People v. *Lilley,* 43 Mich., 521.
Pinkard v. *State,* 30 Ga., 757.
State v. *Allen,* 47 Conn., 121, 129.
Shannon & Nugent v. *Com.,* 14 Pa. St., 226, 228.
Harris v. *State,* 15 Tex. App., 629.
Rex v. *Edmeads,* 3 C. & P., 390.
1 Bish. New C. L., Sec. 733 (2).
1 McClain C. L., Sec. 224.

And in the absence of evidence to the contrary, the presumption of innocence applied in this case in this court means that Daily did so withdraw himself from any conspiracy, of which it may be held that he was a member. And the presumption of innocence is applicable in this court, it is submitted, not as evidence of his innocence of any crime with which he may be charged in either of the indictments, but as evidence of his innocence of any act (not an ingredient of the crime with which he may be charged in either of the indictments) which is relied upon as an act done by him in Michigan for the purpose of connecting him with the commission of any crime charged or any conspiracy which it may be held ripened into such crime. In this *habeas corpus* proceeding said last described act is the ultimate fact

It is clear, therefore, that no conspiracy is charged in the indictments to obtain money by false pretences or by any unlawful means. And the alleged agreement to give and to accept a bribe, as hereinbefore shown, does not constitute a conspiracy.

3. But assume that the existence of a conspiracy between Daily and Armstrong to substitute the Ayton machinery is charged and has been proved. The next question that arises is, When was such conspiracy formed? When did Daily and Armstrong agree so to do? On this point there is no evidence in the record except this, that it may be gathered from the indictment that the alleged conspiracy, if any, was formed before the return of the indictment.

The allegations of such conspiracy in the indictments, assigning to that conspiracy the date stated in the margin of either indictment, to-wit, the March Term, 1909, of the Circuit Court of Jackson County, Michigan, or the date which can be gathered from the fourth count of the indictment for bribery, should be wholly disregarded as allegations of evidentiary facts, which the grand jury did not have the jurisdiction to find, especially as to the indictment for bribery, for the reason that what is alleged therein is wholly irrelevant to the charge of giving the $1,500 as a bribe. And as to the evidence on this point, it is submitted that Armstrong does not state in his affidavit or in his testimony that he gave Daily to understand that he would accept the present and connive at the substitution of the machinery, on the day on which the present was first offered, that is, within ten days before July 22,

1907, or at any time on or before July 22, 1907, or November 14, 1907, or April 7, 1908, or at any other time.

I.

LEADING CASES HOLDING ADVANCE STAGES OF PREPARATION NOT TO AMOUNT TO AN ATTEMPT TO COMMIT A CRIME, AND, THEREFORE, NOT TO BE THE JURIDICAL CAUSE OF A CRIME.

The People v. *Murray*, 14 Cal., 159;
United States v. *Stephens*, 12 Fed. Rep., 52;
Reg. v. *Williams & Rees*, 1 Den. C. C., 39;
Reg. v. *Meredith*, 8 C. & P., 589, 590;
Patrick et al. v. *The People*, 132 Ill., 529, 533-535;
Hicks v. *Com.*, 86 Va., 223.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 638.

CHRISTOPHER STRASSHEIM, SHERIFF OF COOK COUNTY, ILLINOIS, APPELLANT,

vs.

MILTON DAILY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

We have given as careful attention to the elaborate brief filed by defendant's counsel as the short time elapsing since its receipt permitted.

We differ, radically and fundamentally, in our conceptions of the issues involved.

Our view of the case excludes very much of the discussion of abstruse principles of criminal law to which counsel for defendant gives so much attention.

If we have correctly interpreted the decisions of the court governing the proceeding at bar, the scope of judicial inquiry is very much narrower than the field of counsel's argument.

So lately as the case of Appleyard v. Massachusetts, 203 U. S. 222, decided in 1906, this Court determined the questions at issue and restricted the extent of judicial review in the following language: Approving Roberts v. Reilly, 116 U. S. 80.

"It must appear, therefore, to the Governor of the State to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the Governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State, the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus. The second is a question of fact, which the Governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the Executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

Since that time the following cases bearing upon the subject have been decided in this court.

McNichols v. Pease, 207 U. S. 100.

So far as that case deals with any question pending here it defines the right of the defendant as follows:

"One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive

from the justice of the demanding State, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

Upon the question of the date fixed in the requisition papers for the commission of the offense the opinion says:

"If the authorities of Wisconsin were bound by the date named in the requisition papers, which we do not concede (1 Pomeroy's Archbold's Cr. Pr. & Pl. 363) still the record contains no such case as is contended for by the accused."

Bassing v. Cady, 208 U. S. 386.

This case holds that unless as a result of a first extradition the accused has been placed in legal jeopardy, such first extradition has no effect upon a second indictment and extradition for the same offense, even though the defendant was permitted after such first extradition to leave the demanding state without objection by its authorities.

Pierce v. Creecy, 210 U. S. 387.

This case was fully discussed in our original brief.

Compton v. Alabama, 214 U. S. 1.

This case is also cited in our main brief.

Marbles v. Creecy, 215 U. S. 63.

So far as this case affects at all the one at bar its importance rests upon two principles laid down by the court as follows: Alluding to the hearing before the Governor, the opinion says:

"He was, no doubt, at liberty to hear independent evidence showing that the act with which the accused was charged by indictment was not made criminal by the laws of Mississippi and that he was not a fugitive from justice. No such proof appears to have been offered to the Governor or to the court

below. But the official documents, reasonably interpreted, made a prima facie case against the accused as an alleged fugitive from justice and authorized that Executive to issue his warrant of arrest as requested by the Governor of Mississippi."

And at page 69 the following is found:

"The court that heard the application for discharge on writ of habeas corpus was entitled to assume, as no doubt the Governor of Missouri assumed, that the State demanding the arrest and delivery of the accused had no other object in view than to enforce its laws, and that it would, by its constituted tribunals, officers and representatives, see to it not only that he was legally tried, without any reference to his race, but would be adequately protected while in the State's custody against the illegal action of those who might interfere to prevent the regular and orderly administration of justice."

Reviewing the doctrine of the various cases out of which has developed the present status of the law we contend with confidence that, except as hereafter noticed, the lengthy discussion of defendant's counsel is not pertinent to the issues of the pending controversy.

No precedent has been cited upon the main argument tendered by our former brief save as counsel seeks to deduce from

Hyatt v. Corkran, 188 U. S. 691

the overruling of decisions cited by us relative to the non-conclusive character of the averment of the indictments as to the time of the alleged offenses.

We submit that neither decision nor dicta in that opinion supports the conclusion of defendant's counsel as to its effect.

The stipulation involved in the submission of that case was interpreted as follows:

"In the case before us it is conceded that the relator was not in the State at the various times when it is alleged in the

indictments the crimes were committed, nor until eight days after the time when the last one is alleged to have been committed. That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof or offer of proof to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the State at the times named in the indictments, and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the State when the crimes were, if ever, committed."

That case, as is shown by the quotation from the opinion in our former brief was treated as one of claimed constructive presence and his absence from the State at the time of the commission of the offense was deemed to be conceded by the stipulation.

We further submit that not only will no authoritative case be found where the quality of the participation of the accused has been considered on the hearing on habeas corpus, but that such consideration would be out of harmony with all the decisions of this Court on the subject.

Yet, this is precisely what is attempted by the brief of defendant's counsel. At great length he seeks to show that what defendant did on his various visits to Michigan did not amount to a "~~judicial~~ criminal cause" of the charged offense, of bribery or false pretenses. This showing is based on the alleged absence of testimony clearly within the power of the Michigan authorities to produce, when the question of the culpability of the accused shall be properly before the tribunals of that State for determination.

In view of the admittedly proper indictment for the crime of bribery all other questions become unimportant, unless the argument of defendant's counsel relative to the so-called "judicial cause" presents an insuperable objection. We will, therefore, while urging its lack of pertinence to the issues raised here examine the effect of the principle thus asserted.

The crime of bribery consists of the customary criminal steps which considered separately may be technically either a conspiracy, an attempt, an offer, a promise or a gift and punishable in accordance with the charge made.

People v. Salisbury, 134 Mich. 537.
People v. McGarry, 136 Mich. 316.

While the conspiracy does not necessarily merge in the felony so as to bar a separate prosecution it is plainly a part of the selected machinery by which the corrupt result is to be procured and hence becomes an important evidentiary fact.

In like manner the necessary steps to carry into effect the plan by which the result is to be accomplished become, successively, constituent parts of the completed purpose and collectively constitute the crime charged.

And an indictment for the completed offense necessarily covers every one of these successive steps and so far as the criminality of any participation of the defendant is concerned it must be determined on the same principle as though separate indictments had been presented for each constituent element.

The indictment for bribery in the present case sets out fully the circumstances attending the conspiracy out of which arose the final giving of the bribe, the date thereof, and the means whereby the conspiracy became effective, and the presence of the accused in Michigan is wholly between the date of the alleged conspiracy and the final giving of the bribe.

So that unless the court holds that we are confined to the strict date of the manual transmission of the money, it

would seem that the time of the commission of the crime would certainly extend to these occasions.

We are not prepared to agree with the application of the rule of substantive offenses as sought to be applied by defendant's counsel to the facts at bar. We agree with him that because of their dangerous nature, attempts at bribery have been made as a matter of punitive consequences, separate felonies, but this in no wise changes their evidentiary character in relation to each other. They are precisely in their relative effect analagous to the making of the false representations and the payment of the money in a case of obtaining money by false pretenses, but it will not be denied that in the latter case when the offense is completed it may be laid as of either date and the cases cited in our main brief show clearly that the technical division of these elements do not affect at all their character as constituent parts of the crime.

Neither do we accede to the argument of defendant's brief that the juridicial cause is an act which of itself will apparently produce the resultant crime. The making of a false pretense is not in that sense a juridicial cause of the obtaining of the money, yet it directly and immediately tends to the execution of the principal crime and is as we have shown, recognized as a constituent part thereof. The only reasonable way of treating the successive steps which lead from the preliminary conspiracy to the consummated crime is to treat their relation to the purpose and the result as a necessary factor in carrying out such purpose and reaching such result. The refinement of criminal pleading ought not to stand in the way of such recognition and we submit that the reason of no rule affecting the rights of the defendant prevents such treatment. But we further contend that the importance of the presence of the defendant in Michigan on the various occasions when he is shown to have been there is much underrated by counsel. The visit of July 22, 1907, was for the purpose of securing the acceptance of his bid of July 19, 1907, and while defendant's counsel contends that he did not there tender the bid, which

is the word used by us in our former brief, we believe that the facts sustain the finding of the court below that "that bid was accepted by the board of control, Armstrong being present at the time Daily submitted his bid." We believe that Daily and the bid being contemporaneously there, it matters little whether he handed them the bid at that time or had previously transmitted it. He was tendering the bid in effect by his presence there. The transmission is of small importance but the presence of the defendant before the board may be of the utmost importance, the precise effect being dependent upon evidence which every one must concede would have been entirely out of place at the hearing on habeas corpus. In like manner each subsequent visit may prove of material importance in proving guilt upon the trial.

If we were to apply the principle of the doctrine sought to be here applied by defendant's counsel to the facts in the Huffstot case, previously cited, it is certain that no evidence was before the court in that case which would meet the demand here made. There the conspiracy to bribe extended over a considerable period and it was held that the presence of the defendant during this period unexplained was sufficient to warrant the extradition. In the case at bar, we have the presence during the period over which the conspiracy finally consummated into crime extended, and we have the further fact that necessary proceedings for a successful carrying out of the plan of the conspiracy were actually participated in by defendant. We submit that upon the indictment for bribery there can be no doubt raised by the showing of the record as to the propriety of the Governor's warrant of extradition.

We do not wish to be understood as conceding any material defects in the indictment for false pretenses. We insist that the facts recited comply with every requirement of the statute and that only formal words are omitted. Under the Michigan statutes, before referred to, it has been held that if the indictment contains direct and unequivocal averments of such facts—not being mere evidence—as lead immediately and of

necessity to a single and inevitable conclusion, the omission to draw that conclusion will not vitiate the pleading. Evans v. People, 12 Mich. 27. The information in that case was for murder and the conviction was for manslaughter and the indictment omitted in the formal averment, the name of the person killed. See also People v. Kinney, 110 Mich. 102. The principle of those cases is the converse of the proposition advanced in Enders v. People, 20 Mich. 233, relied upon by defendant's counsel, where it is stated:

> "The results must follow from the facts and not from the pleader's conclusions."

A more careful investigation of the authorities cited by us in our principal brief to the effect that the nature of the pretenses used need not be averred in the indictment, convinces us that they were not correctly cited, but it will be seen that they were cited to the proposition of the effect of the warranty and of the supervision of Wrentmore, upon which the court below based his decision that no crime was charged. It will be further seen that such opinion was based upon the indictment for bribery and not at all upon the indictment for false pretenses, which does not contain any statement relative to the warranty nor the supervision of Wrentmore. We had confused the two indictments and the headnote of the opinion first cited, which sustains absolutely the argument there made, led us into an erroneous use of the case. But the point is a minor one and the error in no way affects the argument on any point that we deem pertinent in the cause now before the Court. A like confusing of the indictments on the part of counsel for defendant will be found in his brief where he asserts that we nowhere allege in the indictment for false pretenses that it was money that was paid for the machinery. Reference to each count of the indictment for false pretenses will show that it is described as lawful money of the United States. A like reference to the purchase money in the indictment for bribery did not so state although the bribe is thus described.

The brief period available for the printing of this brief before we must of necessity leave for the argument prevents a fuller treatment of the many questions presented by the brief filed for defendant. We believe, however, that nothing contained therein weakens in any way the logic of our principal brief and we do not believe that it would aid the Court to examine the scores of authorities cited by counsel, which we insist violate the ruling of the Court heretofore made upon each proposition. We therefore contend:

First, That the proceeding by habeas corpus does not throw upon the demanding State the burden of proving that the accused was guilty within the demanding State of some "essential ingredient" or "juridicial cause" of the crime or crimes with which he is charged.

Second, That the prima facie case made by the Governor's warrant can only be overcome by facts conceded or conclusively proven which show illegality in the action of the Governor whose warrant is questioned.

Third, That all questions touching the relation of any act of the accused within the demanding State to the commission of the offense charged should be left for proper determination by the courts of the demanding State.

Fourth, That both the indictments in the case at bar satisfy the requirements of the law.

Fifth, That the record does not show the absence of the accused from the demanding State at the time when the offenses were, if ever, committed, but on the contrary shows criminal acts within the demanding State at such times as would of necessity make them constituent parts of the offenses charged.

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